IN THE

SUPREME COURT OF THE UNITED STATES

.....Term, 1968

Number 78-5981

FRANCIS RICK FERRI,
Petitioner

- vs -

DANIEL ACKERMAN, ESQUIRE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FOR THE COMMONWEALTH OF PENNSYLVANIA

By,
Francis Rick Ferri
P.O. Box 1000
Lewisburg, Pa. 17837
Petitioner, Pro se

CONTENTS

AUTHORITIES

JURISDICTIONAL STATEMENT

(a) This is an appeal from the Opinion & Order of the Pennsylvania Supreme Court, Appendix page 1 thru 11, by a divided Court affirming the lower court's order dismissing petitioner's tort claim against his former assigned counsel.

(b) The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1257 (3). Appeals from state courts for writ of certiorari.

(i) The proceeding below centered upon petitioner's tort claim, under state law, seeking redress for injuries inflicted upon him by his assigned counsel in a criminal prosecution.

(ii) The Order of the Pennsylvania Supreme Court was entered on November 27, 1978 and has not been published.

QUESTIONS PRESENTED FOR REVIEW

Whether a lawyer appointed under the Criminal Justice Act, 18 U.S.C., § 3006A (1964) to represent an indigent defendant in a criminal prosecution is immune from tort liability at the suit of his former client for the failure on the part of that attorney to raise the statute of limitations defense, which would have barred prosecution for ancillary counts of that indictment in which that defendant incurred substansive consecutive sentences ?

STATEMENT OF THE CASE

This is an appeal from the Opinion & Order of the Supreme Court of Pennsylvania (A. 1 thru 11) by a divided court affirming the order of the lower courts, which had dismissed petitioner's complaint against his former appointed counsel holding a lawyer assigned to represent an indigent defendant in a criminal prosecution was absolutely immune from the suit of his former client regardless of the tort inflicted upon that

former client. (A. 8)

On December 13, 1974, Attorney Daniel Ackerman, respondant, was assigned, pursuant to the Criminal Justice Act (CJA), 18 U.S.C. § 3006A (1964), to represent Francis Rick Ferri, petitioner, in a federal criminal prosecution. After a 3 week jury trial petitioner was convicted and the trial court imposed a 30 year term of incarceration. On direct appeal respondant withdrew representation and petitioner obtained retained counsel, who for the first time raised the issue that the statute of limitation had expired for certain counts of that indictment; that the conviction and 10 year sentence on those counts must be vacated.

In the interim petitioner filed a pro se complaint (including amended complaints) charging the respondant with gross negligence, malpractice and breach of contract to the degree of malfeasance for acts of ommission, in the Court Of Common Pleas, Westmoreland County, Penna. After cross briefs were filed petitioner modified his complaint to the specific issue of respondant's failure to protect the fundamental right of the petitioner not to suffer a prosecution and conviction with the subsequent term of incarceration where the statute of limitation had expired. In support of his complaint petitioner presented the Court of Common Pleas with exhibits (copies A. 12, 13 and 14) of the Third Circuit Court's Order affirming petitioner's conviction, 546 F. 2d 419, (1976), where the Court held that failure to raise the limitations defense at trial constituted a waiver.

The Westmoreland County Court held the respondant was absolutely immune for the tort noted above for reasons of public policy. The Superior Court of Penna. affirmed and the Supreme Court of Penna. granted certiorari on July 20, 1978. Thereafter on November 27, 1978, affirmed the order of the lower court in an 11 page opinion with 2 judges dissenting.

It is from the denial of the Order entered by the Pennsylvania Supreme Court on November 27, 1978, your petitioner seeks a review of that Opinion and Order and files this Petition For Writ Of Certiorari.

REASONS FOR GRANTING THE WRIT

1. Petitioner believes an important question of constitutional law is at issue here, the dimensions of the degrees of absolute or qualified immunity afforded appointed counsel in a criminal prosecution from the suit of his former client, which has not been decided by this Court.

2. Petitioner believes that the decision of the Supreme Court of Pennsylvania is in direct contradistinction with recent decisions of this Court in Imbler v Pachtman, 424 U.S. 409 (1976); Butz v Economou, 42 L.W. 4961 (1978) and Wood v Strickland, 420 U.S. 308 (1975) pertaining to the application of the doctrine of absolute immunity beyond an exercise of discretion.

ARGUMENT

It is the petitioner's position that he should have been permitted to pursue his complaint; that the Supreme Court of Penna. has stretched beyond what is necessary the outer limits of absolute immunity afforded defense counsel in presenting and protecting his client's case before the Courts. In support thereof he presents the following:

1. Petitioner contends that the failure of assigned counsel (acting under a full fee basis) in a criminal prosecution to interpose the statute of limitation defense in behalf of his client is akin to a research duty analogous to an administrative function or investigative activity where at best only a qualified immunity is available from the suit of his former client, since that duty is not intimately associated with the judicial

of the representation and requires no exercise of judgement where qualified immunity is necessary. Imbler, supra, Butz, supra.

Since the limitation defense could have been raised after trial but before sentencing (a 43 day period), the inexcusable negligence of the respondant to see that all defenses are preferred, a Constitutional obligation Brescia v New Jersey, 417 U.S. 921 (1975), precluded a qualified immunity and only a good faith defense is available, Wood v Strickland, 420 U.S. 308 (1975).

2. When the petitioner asserted his right to counsel under the Sixth Amendment, Hamilton v Alabama, 368 U.S. 52 (1961) he did not waive or agree to waive, Johnson v Zerbst, 304 U.S. 458 (1938) his [other] Constitutional rights to seek redress for a potential tort inflicted upon him by assigned counsel, i.e., the tolerable dilemma of having to surrender one Constitutional right to assert another, Simmons v United States, 390 U.S. 377 (1968).

3. Pursuant to the doctrine of collateral estoppel the respondant is precluded from averting liability for his professional misconduct.

a) States may regulate the issuance of licenses to professionals and code of performance (or conduct) expected from those licenses, in this case lawyers, Spevack v Klein, 385 U.S. 511 (1968), N.A.A.C.P. v Buttons, 371 U.S. 415 (1963) unless the regulation infringes upon constitutional privileges, Cohen v Hurley 366 U.S. 117 (1961). Under Penna. law, Rule 205 (A. 15) Pa. R. of Civil P., adopts the A.B.A's. Code of Professional Responsibility as Statutory law, Slater v Rimar, Inc., 338 A. 2d 584 (Pa. Sup. 75) Ruth v Crane, 392 F. Supp. 724 (D.C. Pa. 75). Cannons 6-6 and 7 of the Professional Code of Responsibility prohibits a lawyer from averting his liability for his professional malpractice.

b) The W.D. of Pa's. Criminal Justice Act Plan also adopts the A.B.A's Code of Professional Responsibility (A. 15). That plan has the force and effect of statutory law, American Roller Co. v Budinger, 513 F. 2d 982

(3 Cir 75), Woods Construction Co. v Atlas Chemical Ind. Inc., 337 F. 2d 888 (5 Cir. 64) the rules aocpted by the U.S.D.Cs. have force and effect of law. Their are numerous authorities that hold the fee compensation schedule in the U.S.D.C's Plans are statutory law, United States v Owens, 256 F. Supp. 861 (D.C. Pa. 66). Therefore the same principle of law expressed in item 3 (a) above applies here.

Thus one cannot avail himself to the benefits of a statute in one and later with the other hand reputiate its validity, Buck v Kuykendall, 69 L. Ed. at 627, Cohen, supra, overruled in Spevack, supra (on 5th Amend. Privilege) unless that statute infringes on Constitutional privileges.

4. The ruling of the Penna. Supreme Court violates the Petitioner's rights under the 14th Amendment's equal protection clause. Petitioner, unlike the criminal defendant proceeding with retained counsel, has no avenue of redress for a tort inflicted upon him by his assigned counsel, regardless of the nature of the tort.

5. The Penna. Supreme Court has invalidated contracual obligation between the petitioner and the respondant grounded under the Sixth Amendment's attorney-client clause, National Savings Bank v Ward, 100 U.S. 195, with the government merely guaranteeing payment for the petitioner is not relieved under the contract for its financial obligations, (A. 15) Fuller v Oregon, 417 U.S. 40 (1974), United States v Kahn, 415 U.S. 239 (1974) (see A. 15). This Court held in Perry v United States, 79 L. Ed. 912 (1935) that even Congress could not repudiate the government's obligations to pay on certain certificates. Thus the Penna. Supreme Court's ruling has also enacted a bill of attainer, after the fact, upon those parties who seek redress for constitutional torts inflicted upon them by their assigned counsel in a criminal case.

6. The need to provide assigned counsel in a criminal case absolute immunity for a tort committed beyond an exercise of discretion from the suit of his former client has disappeared in todays competitive market, Bates et al v State Bar of Arizona, 53 L. Ed. 2d 810 (1977), with over 453,000 lawyers competing for clients. With todays fee paying schedules for Court appointments many lawyers compete for court assignments and often earn the bulk of their livlihood from court appointments.

The critical inquiry here concerns the nature of the official behavior challenged not the identity or the title of the officer responsible, Briggs v Goodwin, 569 F. 2d 10 (D.C. Cir. 77) for liability in damages for unconstitutional conduct or otherwise illegal behavior has the very desirable effect of deterring such conduct, Imbler, supra at 442 Justice White concurring.

Certainly the flow of school teachers has not diminished since the Wood, supra decision, nor of prosecutors since Burkhart v Saxbe, 397 F. Supp. 499 (E.D. Pa. 75) (see Imbler, supra at 430 f.n. 31), nor of Federal Agents since, Bivens v Six Unknown Narcotic Agents, 403 U.S. 388 (1971), nor of Governors since Schuer v Rhodes, 94 S. Ct. 1689 (1974), nor of lawyers Fort Meyers Seafood Packers Inc. v Stepoe & Johnson, 381 F. 2d 261 (1961).

Certainly the public trust is entitled to adequate protection absent liability for the appointed counsel for a constitutional tort beyond an 1/

1/ No restraint in the form of a potential liability is suggested here while the attorney is vigorously performing his duties as the advocate before the bar, rather it is called to this Court's attention we are dealing with lawyers who are trained in the law unlike the public official who is cast into position of having to make decision he is unfamiliar with, knowing he cannot please all parties affected, and the tort that may attach.

exercise of judgement, beyond his counterpart the prosecutor, public justice becomes meritless and the condoning of the tort in question here would only add to the mistrust the public now places in the legal profession.

Here the respondant seeks to hide behind the immunity afforded his profession as a whole for his individual professional misconduct when it is doubtful if he could obtain the support of his collegues for the tort committed here. 2/

Since relief is precluded throught the criminal appeal process how then may the petitioner seek relief for the undeniable constitu-tional tort inflicted upon him here.

2/ In each case cited by the Pa. Supreme Court pertaining to the liability of an appointed attorney from the suit of his former client, that client was unable to prove he was unjustly convicted through the lawyers remiss and complained of the lawyers trial tactics.

CONCLUSION

It is respectfully submitted that a writ of certiorari ought to be granted to review and decide the constitutional question presented here, the boundaries of absolute or qualified immunity afforded assigned counsel in a criminal prosecution from the suit of his former client for the constitutional tort inflicted upon that client by his former assigned counsel.

Respectfully submitted,

F. R. Ferri

Francis Rick Ferri
P.O. Box 1000
Lewisburg, Pa. 17837

Petitioner, pro se

EDITOR'S NOTE: ALL DOCUMENTS ATTACHED AS EXHIBITS TO THE PETITION ARE REPRINTED IN THE SEPARATE APPENDIX VOLUME.

APPENDIX

In The Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI, *Petitioner*

v.

DANIEL ACKERMAN, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF PENNSYLVANIA, WESTERN DISTRICT

PETITION FOR CERTIORARI FILED
JANUARY 2, 1979
CERTIORARI GRANTED
FEBRUARY 21, 1979

APPENDIX

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INDEX

DOCKET SHEET (WESTMORELAND COUNTY)

(For self)
Francis Rick Ferri, and
Constance Jean Ferri,
and
Luigi Ferri &
Concetta Ferri
and related parties
whom vested interest
may appear

2633 vs
(Nakles-Schumacher)
Daniel Ackerman,
Esquire

Tax & Fee Atty	
Nakles	$25.00
Atty	3.00
Pro Sukala Atty	
Nakles	25.00
Pro Sukala 5-16-77	20.00

Certification of Docket Entries and all original papers filed in Negligence Action from Union County, Pennsylvania at No. 115 1976 and transferred to Westmoreland County, Pennsylvania by virtue of the following Order: AND NOW, this 20th day of August, 1976, the defendant's preliminary objections are sustained, and the Prothonotary is ordered to transfer this cause of action to the Court of Common Pleas of Westmoreland County upon the plaintiff's paying the costs. BY THE COURT: A. Thomas Wilson, P.J. Eodie: Complaint in Negligence filed in Union County March 4, 1976; Affidavit of Service and Affidavit to proceed In Forma Pauperis filed in Union County March 4, 1976; Praecipe for Appearance filed in Union County March 25, 1976; Preliminary Objections and Petition Raising Question in Venue filed in Union County March 25, 1976; Plaintiffs response to Defendant's Preliminary Objections filed in Union County April 2, 1976; Preliminary Objections to Amended Complaint filed in Union County April 15, 1976; Defendant's Brief Supporting Preliminary Objections relative to Venue filed in Union County April 15, 1976; Plaintiff's Brief in Support of Respondent's Preliminary Objections to Union County as Court of Venue filed in Union County April 22, 1976; Letters concerning Exhibits filed in Union County April 30, 1976; Amended Complaint, Petition to proceed with a Jury Trial filed in Union County August 20, 1976; Opinion and Order filed in Union County August 23, 1976; Order filed in Union County August 24, 1976. Filed in Westmoreland County August 25, 1976 at 11:30 A.M.

AND NOW, August 30th, 1976, this case having been transferred to this Court from Union County by order of

President Judge A. Thomas Wilson dated August 20, 1976, and because Preliminary Objections of defendant are still pending; IT IS HEREBY ORDERED that the Court Administrator list this case on the Court En Banc Argument List for Friday, October 29, 1976; both parties have agreed in the papers filed to submit the case on briefs without oral argument. Defendant's brief shall be filed on or before September 15, 1976; the brief of Plaintiff Francis Rick Ferri shall be filed on or before October 19, 1976. The Court Administrator shall mail a copy of this Order to the parties. BY THE COURT: Richard E. McCormick, J. (Filed August 30, 1976).

October 12, 1976 Order, the Court Administrator is directed to place the case on the next available Argument List. By the Court: Richard E. McCormick, J.

November 3, 1976, Plaintiff's Interrogatories, Pursuant to Rule 4004, etc., Pa. Rules Civil Pro, filed.

November 19, 1976 Plaintiff's Interrogatories to George Schumacher, Esquire, filed.

November 19, 1976 Plaintiff's Interrogatories to The Honorable George Wallace, Governor of Alabama, filed.

November 19, 1976 Plaintiff's Interrogatories to Boron Oil Company & Its Credit Card Division, filed.

November 29, 1976, Plaintiff's Motion to the Court Requesting: Appropriate Order Compelling the Defendant to Respond to Plaintiff's Written Interrogatories, filed.

December 9, 1976 Plaintiff's Interrogatories to Police Chief Kent, Plum Borough, and Answers thereto, filed.

December 17, 1976 Plaintiff's Notice to the Court and Its Subdivisions of Required (60) Notice in Advance of ant Trial Proceedings to Plaintiff, filed.

December 23, 1976 Motion to Strike Defendant's Arguments in (2 and 3) His Motion to Dismiss the Complaint (9-15-1976), filed.

December 23, 1976 Plaintiff's Objection to Defendant's Motion for a Protective Order filed.

January 11, 1977 Defendant's Motion for Protective Order filed and the following order made: AND NOW, January 3, 1977, upon motion of Ned J. Nakles, attorney for Defendant, and for shown, IT IS HEREBY ORDERED, pursuant to Pa. R.C.P. No. 4011, that Defendant is not required to answer any Interrogatories filed by Plaintiff until the issues raised by Preliminary Objections filed by Defendant are decided by the Court en Banc. BY THE COURT: Richard E. McCormick.

January 11, 1977 Defendant's Motion for Protective Order filed and the following order made: AND NOW, January 3, 1977, upon motion of George E. Schumacher, Attorney for Defendant, and for cause shown, IT IS HEREBY ORDERED, PURSUANT TO R.C.P. No. 4011, that Defendant's counsel is not required to answer any Interrogatories filed by Plaintiff until the issues raised by Preliminary Objections filed by Defendant are decided by the Court en Banc. BY THE COURT: Richard E. McCormick, Judge.

January 12, 1977, Conditions Governing the Production of a United States Prisoner Upon a Writ of Habeas Corpus Issuing Out of a State Court, filed.

January 13, 1977, Plaintiff's Motion to the Court For an Appropriate Order Compelling the Listed Parties, Boron Oil Company, New America Film Co., and George Schumacher, to respond to the Written Interrogatories, filed.

AND NOW, to wit, this 21st day of January 1977, for the reason that this case has been previously assigned to Judge Richard E. McCormick, it is removed from the Argument List. BY THE COURT: Gilfert M. Mihalich, J. (Filed January 24, 1977).

January 31, 1977 at 11:52 A.M. Opinion and Decreee, sustaining preliminary objections in the nature of a demurrer and dismissing the original complaint as amended filed.

January 31, 1977 at 11:52 A.M. Order of Court made: AND

NOW, to wit: this 31st day of January, 1977, after due and careful consideration of the pleadings and briefs presented in this matter, it is hereby ORDERED, ADJUDGED AND DECREED that Defendant's Preliminary Objections in the nature of a Demurrer are hereby sustained, and the Original Complaint as amended is dismissed. BY THE COURT: Richard E. McCormick, Judge. CONCURRING: David H. Weiss, P.J. AND L. Alexander Sculco, Judge. Eo Die: Notice to Attorneys of Record.

AND NOW, to wit: this 27th day of January 1977, it is ORDERED AND DIRECTED that the Voluntary Non Suit filed by Plaintiff Francis Rick Ferri be hereby stricken from the record as not being in conformity with Pa. R.C.P. No. 230, which provides that a "voluntary non suit shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff during the trial." BY THE COURT: Richard E. McCormick, J. (Filed January 31, 1977).

February 7, 1977, Notice of Appeal to the Superior Court of Pennsylvania, filed,

April 13, 1977, Plaintiff's Response to Defendant's Motion to Dismiss the Appeal for Failure to Docket the Appeal filed.

April 13, 1977, Second Notice of Appeal to the Superior Court of Pennsylvania, filed.

April 15, 1977, Notice of Appeal to the Superior Court of Pennsylvania at No. 676 April Term, 1977 filed.

December 18, 1978, at 1:52 P.M. Appeal from the Superior Court of Pennsylvania at No. 676 April Term, 1977, PER CURIAM: Filed: February 15, 1978, Order affirmed: AND NOW, this 15th day of February, 1978, it is ordered as follows: Order Affirmed. BY THE COURT: Irma J. Gardner, Deputy Prothonotary.

December 18, 1978, at 1:52 P.M. Order from the Supreme Court of Pennsylvania Western District at No. 98 March Term, 1978: ON CONSIDERATION WHEREOF it is not here ordered and adjudged by this Court that the Order of the Superior Court, be, and the same is hereby affirmed. BY THE COURT: Sally Mrvos, Esquire Prothonotary.

December 18, 1978, at 1:52 P.M. Opinion from the Supreme Court of Pennsylvania Western District at No. 98 March Term, 1978: The order of the Superior Court affirming the order of the trial court en banc, sustaining the demurrer and dismissing the complaint is hereby affirmed. Mr. Justice Manderino concurs in the result. Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice Larsen joins.

December 18, 1978, at 1:52 P.M. Dissenting Opinion from the Supreme Court of Pennsylvania Western District at No. 98 March Term, 1978: I would, therefore, reverse the order of the Superior Court. Mr. Justice Larsen joins in this dissenting opinion.

NOTE: Although not contained in the docket sheet, it is stipulated by the parties that the plaintiff's traversal brief was filed on October 18, 1976.

IN THE COURT OF COMMON PLEAS
FOR UNION COUNTY
COMMONWEALTH OF PENNSYLVANIA

Francis Rick Ferri
United States Penitentiary
Lewisburg, Pa. 17837

&

Constance Jean Ferri
R. D. #1
Boyers, Pa. 16020

&

Luigi Ferri &
Concetta Ferri
535 Allegheny Avenue
Glassport, Pa. 15045

&

Related Parties, Whom
Vested Interests May
Appear
Plaintiffs (et al)

-v-

Mr. Daniel Ackerman,
Esquire
27 North Main Street
Greensburg, Pa. 15601
Respondant

Civil Action Law
Docket Number

no 115 1976

Jury Trial Demanded

Jurisdiction

Plaintiffs (et al) are residents of the Commonwealth of Penna. Francis Rick Ferri, Plaintiff is a resident of Union County Post Office Box 1000, Lewisburg Pa. 17837, having resided therein for the last thirty (30) months having resided in the Commonweath of Pennsylvania, for forty (40) yrs.

COMPLAINT IN NEGLIGENCE
FILED MARCH 4, 1976

Complaint of Negligence by Daniel Ackerman, Esquire, in Administrating the Defense for Plaintiff, Pursuant to Chapter 66, Articles 3391 and 3393, of The Pennsylvania Rules Of Civil Procedure. to wit:

That the Defendant, Daniel Ackerman, Esquire, being an attorney of the bar of the Commonwealth of Pennsylvania, the Plaintiff, in the Month of December 1975 appeared in Federal Court to answer a criminal indictment without counsel, the Federal Court appointed, defendant as counsel for the plaintiff, the defendant under took said appointment to defend plaintiff in said action in a skillfull and dilligent manner, as proscribed by the Pennsylvania and American Bar Association's Canons of Ethics and sworn to uphold by Defendant.

That Plaintiff had a complete defense to said action which he communicated to defendant beginning on or about December 19, 1974 continuing to April 17, 1975.

That criminal proceedings were held in Federal Court beginning on or about December 19, 1974 before Honorable Judge Rabe Marsh in indictment number 74-277 of which defendant was duly bound to interpose said defense by accepting appointment as counsel for plaintiff there-in. That said defendant failed to interpose said defense, defendant wholly neglected to do so and by reasons thereof and through his negligence, plaintiff was found guilty and sentenced to serve thirty (30) years confinement in federal prison.

STATEMENT OF FACTS

1) The Defendant is a member of the Bar, Commonwealth of Pennsylvania practicing law the entitled address.

2) On or about December 15, 1974 Defendant accepted appointment as counsel for Plaintiff in answer to a criminal indictment in Federal Court said indictment number 74-277.

3) On December 19, 1975, defendant interviewed plaintiff at the Alleghney County Prison pursuant to said appointment in item 2.

4) On December 20 and 21st, 1974, defendant wrote two (2) letters to your plaintiff stating points of law and oral communication with the trial court, Honorable Judge Rabe Marsh.

5) That beginning on or about December 15, 1974, plaintiff wrote numerious letters to defendant instructing said defendant and informing said defendant of his defense in the criminal action in federal court 74-277, said correspondence continued through to May 1975.

6) The Plaintiffs are relation(s) of Francis Rick Ferri, to wit:

   (a) Constance Jean Ferri at the time of the events in this complaint was married to plaintiff knowing full well of plaintiff then term of incarseration fully expecting to resume matramonial relations upon plaintiff's then anticipated release.

   (b) That Constance Jean Ferri has been deeply aggrieved by the imposition of an additional twenty two (22) years of sentencing confinement upon plaintiff, both mentally and financially.

   (c) That Luigi Ferri & Concetta Ferri are the parents of Francis Rick Ferri, and were fully competent to stand the pressures of plaintiff's original sentence, however the imposition of an additional twenty two (22) years upon their son has deeply aggrieved their mental state as well as financial state.

   (d) That Linda, Jeffry & Richard Ferri are the children of Francis Rick Ferri having close emotional ties to

their father of long standing and were prepared to withstand the original hardships of Francis Rick Ferri's original sentence, however upon the imposition of an additional twenty two (22) years of confinement upon their father has left them deeply aggrieved both mentally and emotionally and financially.

   (e) That Lorraine Ferri is the mother of Linda, Jeffrey & Richard Ferri being the former Mrs. Francis Rick Ferri. That Lorraine Ferri and Francis Rick Ferri although long divorced maintained a excellent relationship as to the parental guidence of their respective children. That Lorraine Ferri depended upon Francis Rick Ferri for both mental as well as financial support in raising their children. That Lorraine Ferri was prepared to withstand the hardships of Francis Rick Ferri's original term of confinement, however the imposition of twenty two (22) years of additional confinement has deeply aggrieved her both mentally and financially.

7) That a pre-trial conference was held on or about January 17, 1975 in said criminal action before Honorable Judge Rabe Marsh lasting four (4) days.

8) That a trial by jury began on or about February 17, 1975 continuing through to March 6, 1975, resulting in a guilty verdict against plaintiff.

9) That Plaintiff complained continually through-out these proceedings about defendant's failure to act in a dilligent, intelligent manner failing to interimpose said defense, that plaintiff had communicated to defendant in numerios memos, letters, petitions to the court, and motions filed in his be-half in an attempt to bring out said defense.

10) That in May 1975, defendant realizing that plaintiff had legitimite causes against defendant for negligence upon his inactions resigned as appointed counsel.

11) That Plaintiff, Francis Rick Ferri, received a sentence of thirty years (30) imposed by the Honorable Judge Rabe Marsh, as a result of the jury's verdict in criminal action 74-277, said sentence has caused irr-repairable mental, emotional and financial grieviences upon Plaintiff.

12) The complete record(s) of Criminal Number 74-277, U.S.D. Court, for the Western District of Pennsylvania, which is Plaintiff issue of negligence herein, may be located in the, "record de hors," U.S. Clerk of Courts, United States Courthouse, Pittsburgh, Pa. under the captioned docket entry.

COMPLAINT-IN-NEGLIGENCE

Plaintiff's complaint in negligence is more fully exposed in the ensuing Titles, *ISSUE A A*, *ISSUE B B*, *ISSUE C C*, and their respective numbered paragraphs.

Issue A A, Defendant's negligence in administring Plaintiff's defense at The pre-trial hearing on Janaury 17, 1975.

1) Plaintiff had written numerious letters to defendant and to the court requesting the subpeona of certain documents, witness and related criteria, begining on or about December 13, 1974 through to January 21, 1975, including the filing of several motions to dismiss portions of the indictment as well as the indictment itself.

2) Plaintiff neglected to interview one (1) witness nor to allocate one day of his schedule to prepare for the pretrial hearing on January 17, 1975.

3) The court submitted all correspondence that it had received from your Plaintiff to defendant, on or about December 18, 1974.

4) Defendant failed to subpeona Pennsylvania State Police Officer whom interviewed Plaintiff at Federal Prison in October 1974, plaintiff informed the court and defendant of this via written correspondance.

5) Defendant failed to subpeona Pennsylvania State Police Officer who also interviewed Plaintiff at Federal Prison in October 1974, plaintiff informed the court and the defendant of this via written correspondance.

6) Defendant failed to subpeona U.S. Postal Inspector also interviewed Plaintiff at Federal Prison in October 1974, Plaintiff informed the court and the defendant of this via written correspondance.

7) Defendant neglected to subpeona the, Writ of Habeas Corpus Ad Testificandum issued to transfer plaintiff from Lewisburg, Pa. Prison to the New Haven, Connecticut Prison with its accompanying affidavits and supporting memos. Plaintiff informed the court and the defendant of this via written mail.

8) Defendant neglected to subpeona the, Writ of Habeas

Corpus Ad Testificandum issued to transfer plaintiff from Lewisberg, Pa. Prison to the Alleghney County Jail in Pittsburgh, Pa. issued on or about January 4, 1974 by federal attorneys, with its accompanying affidavit and supporting memos. Plaintiff informed the court and defendant of this via written correspondance.

9) Defendant neglected to subpeona the, portion of the U.S. v Klein 515 F 2d transcript (3 cir 1975) where plaintiff was subject of a pre-trial hearing, being presented as a witness in that trial by government attorney's. Plaintiff informed the court and the defendant of this via written correspondance.

10) Defendant neglected to subpeona the, witnesses list given the defense in U.S. v Klein, supra, on January 16, 1974, listing plaintiff as a witness in the Klein, supra, trial. Plaintiff informed the court and defendant of this via written correspondance.

11) Defendant neglected to have testify attorney's Fink and Iseral despite the fact that Fink had been subpeoned and government counsel attested to conversations with Iseral concerning plaintiff, Plaintiff requested defendant to have both attorneys testify in both written and oral communications, attorneys Fink and Iseral were present at that hearing and had interviewed plaintiff at the Lewisburg, Pa. Prison in summer of 1974.

12) Defendant neglected to have subpeoned the witness list furnished by the Insurance company in a State Civil Trial where government attorneys were assisting that Insurance Co. had provided plaintiff's name as a witness for the Insurance company. That Civil trial occurring in summer of 1974, involving the destruction of an ice plant by fire, in Greensburgh, Pa.

13) Defendant failed to object when court ordered sequestration of all witnesses then ordered the defense to present it's contentions first by permitting the U.S. Attorney to testify first then remain, despite the court's order of sequestration, that U.S. Attorney, Crawford, being the government's main witness as well as chief prosecutor, whom the infractions in the petition to dismiss filed by plaintiff were the subject of the hearing.

14) Defendant neglected to object when court ordered the

expungement of the testimony of attorney Thomas Livingston a key witness for the plaintiff.

15) Defendant neglected to subpeona attorney James Ashton with his records as Ashton had represented Bertini the government's key witness against petitioner and had represented plaintiff in the prior mentioned court records in items (B B, no. 7). Plaintiff had written to the court and to defendant via correspondance on several occasions on this matter.

16) Defendant neglected to question F.B.I. agent Rogers if he referred Plaintiff's name and related data to U.S. Attorney's Office in New Haven, Connecticut, and if so why, neglected to question Rogers why he visited Plaintiff at the Lewisburg, Pa. Prison in November 1974. Plaintiff submitted to defendant a list of questions to ask F.B.I. agent Rogers.

17) Failed to have testify U.S. Magistrate Mitchell, who has offices in the same federal building, plaintiff had written to the court and defendant for Magistrates testimony.

18) Defendant neglected to have the transcript of plaintiff's arraignment hearing transposed for cross examination of government witnesses and as evidence favorable to plaintiff.

19) Defendant neglected to cross-examine government counsel Crawford on his prior testimony in Plaintiff's other cause (72-245, hearing 7/17/73) where Crawford states that the government had an airtight case in 1973, this issue being a vital factor in that pre-trial hearing. Plaintiff submitted that transcript to defendant who ignored such.

Issue B B, Defendant's negligence in advising Plaintiff on Points of Law and in failing to properly negotiate with the court a requested plea bargain, favorable to the plaintiff and a matter of court records.

1) Upon plaintiff's initial meeting with defendant a plea of guilty was discussed in accordance with prior court proceedings, subsequently defendant issued two (2) letters

to plaintiff stating somewhat the context of the meeting with points of law, occurring on or about 12/19/74.

2) Plaintiff responded to defendant's letters on or about 12/24/1974 accepting the proposal context of the letters requesting clairification of certain points of law.

3) Nothing was done in futherance of the intended guilty plea by defendant.

4) Plaintiff filed a motion attempting to bring out the issue of why endure a futile trial, win or loose plaintiff still went back to prison to complete service of present sentence, defendant neglected to act in any manner. This motion was filed on or about January 17, 1975.

5) At the hearing on January 17, 1975 the court asked plaintiff if he wished to change his plea, plaintiff responded no, and was cut off when he began to state, "no, unless certain agreements are adheered to" plaintiff then informed his counsel that he wanted counsel to call to the court's attention the letters in items (1) and (3), counsel did nothing.

6) Defendant informed plaintiff that if he testified at the pre-trial hearing on January 17, 1975, the government could introduce this testimony at the latter trial, whether plaintiff testified at the latter trial or not.

7) At the onset of trial on February 17, 1975 plaintiff instructed defendant while he was in the U.S. Marshall's holding cell in the federal courthouse that, upon commencement of the proceedings when plaintiff was present to request from the court permission to plead guilty according to prior court records and the right to preserve his pre-trial issues for appellate review if the court refused to enter a plea of nolo contendere and request the context of the letters in items (1) and (2) in open court. Plaintiff entered the court room the court stated, "you may not change your plea" plaintiff asked defendant if he had done as requested, defendant stated he had except he could not embarrass the court with those letters, and refused to do so.

Issue C C, Defendant's negligence in administering Plaintiff's defense when a complete defense was prepared and delivered to the Defendant, for trial purposes.

1) Plaintiff delivered via mail and personally list(s) of witnesses to be interviewed and subpeoned, futher delivering list(s) of documents and or records to be subpeoned, beginning from December 19, 1974 through to March 5, 1975, to Defendant, for use(s) favorable to plaintiff at trial.

2) Defendant did "not" interview one witness, for trial preparation.

3) Defendant neglected to interview Attorney Ashton, Bertini's prior attorney for impeachment purposes, futher failing to subpeona Ashton despite your Plaintiff's written request for this to the court and defendant.

4) Defendant neglected to interview Attorney Sullivan, Bertini's prior attorney for impeachment purposes, futher failing to subpeona Sullivan for trial purposes despite the fact that Sullivan was prepared to testify as he had already testified at the pre-trial hearing. Plaintiff requested this vital testimony on several occassions to Defendant.

5) Defendant neglected to interview or subpeona Attorney Thomas Kerr, Bertini's court appointed attorney, for impeachment purposes, despite the fact that plaintiff requested such on several occassions.

6) The trial court made available Bertini's trial transcript for impeachment purposes, Defendant neglected to even read such. Identical witnesses testified at the prior Bertini trial that were listed to testify at this trial 74-277, on the identical same issues.

7) Defendant neglected to have the Bertini sentencing transcript made available for direct impeachment of Bertini, neglected to subpeona such or request such from the court, despite the fact that plaintiff wrote to the court and defendant on several occassions requesting such. (sentencing transcript of Bertini's trial was an independant transcript of the trial transcript)

8) Defendant neglected to have available Bertini's prison records, neglected to subpeona such, to demonstrate Bertini's narcotic habits and crimes, Plaintiff wrote to the court and to defendant requesting such.

9) Defendant neglected to interview Bertini, who was the key witness against plaintiff, despite the fact that the government made Bertini available at the Rule 24 conference, 47 days before trial. Plaintiff submitted a list of questions to interview Bertini by counsel via written correspondence.

10) Defendant neglected to interview any-one of the witnesses furnished by the government on the cronological record, at the Rule 24, conference all of which were interviewed by the government. Plaintiff requested defendant to interview those listed witnesses for exculpatory criteria.

11) The list of possible exculpatory witnesses listed on that cronological record exceeded twenty (20).

12) Defendant neglected to interview the officers of the New America Film Company, whose offices are blocks away from the U.S. Federal Courthouse Plaintiff wrote to the court and to the defendant requesting subpeona of these witnesses and their records related to the then cause of action. Defendant neglected to subpeona such witnesses or records.

13) Plaintiff instructed defendant 60 days prior to trial to locate Attorney George Schulter, interview him and subpeona him, as his parents reside in Whitehall, Pa. a few miles from the Federal Courthouse. Defendant neglected to even attempt to locate Attorney Schulter, he wrote to Ashtons old address.

14) Defendant failed to subpeona or interview a dynimite expert despite plaintiff requests for such.

15) Defendant failed to investigate the interstate allegations of the government in the indictment, despite the fact that Plaintiff gave defendant numerious criteria to review and to futher witnesses to subpeona to contridict the interstate allegations of the indictment.

16) Defendant did not interview the three (3) witnesses that the court made available for impeachment porpuses, namely, Robert Stiver, Daniel Hill and James Jackson.

17) Defendant failed to interview Dr. Vincent Sundry, who testified for the defense, despite the fact that Sundry was in the Federal Courthouse that same day he testified.

18) Defendant neglected to question the witnesses in items 16 and 17 as to Bertini's narcotic habits, despite the fact that the government had stipulated to Bertini's narcotic smuggling, and Plaintiff delived to defendant statements from those witness who knew of Bertini's narcotic habits.

19) Defendant neglected to question Dr. Vincent Sundry as to whom he saw with Bertini at the seine of the crime, despite the fact that Plaintiff delivered to defendant a statement from Dr. Sundry, where Sundry states he observed another individual with Bertini on the night of the crime.

20) Defendant solicited from Dr. Sundry, the response from the Boiler Plate question, *"when and where was the last time you saw plaintiff"*, Dr. Sundry being under oath answered, *"in prison as Plaintiff is in jail with me"*, knowing full well the response that question would obtain and knowing full well of its damaging effects upon plaintiff's cause.

21) Defendant neglected to cross-examine Mr. Lynn Dunn, on his alledged interstate activites, a critical allegation in the indictment, for Dunn stated he displayed or demonstrated the Roger Williams Music Studios to prospective buyers on one hand then on the other hand he stated such studious were closed and non-profitable.

22) Defendant neglected to cross-examine Mr. Wagner on the same subject as in item 21, despite the fact that plaintiff submitted to defendant a list of questions to cross-examine either and both or the witnesses in item 21 and 22.

23) Defendant failed to introduce the Pa. State documents relating to the non-interstate activities of Dunn, despite the fact that plaintiff gave such to defendant.

24) Counsel defendant failed to object when government introduced a tape recording at trial despite the fact the government stated pre-trial it knows of no electronic serveilance.

25) Defendant neglected to put Bertini back on the stand at close of trial when government offered such, by doing so defendant failed to inform the jury of the massive aid

given Bertini by the government, despite plaintiff's repeated requests to do so.

26) Defendant failed to object when trial court stated "impeach on convictions only".

27) Defendant failed to ask for a directed verdict of accquittal upon close of the trial, subsequently failing to ask for dismissal of count two (2) as the government failed to prove any interstate nixus.

28) Defendant failed to ask court order the government to select one or another of the three (3) firearms counts, either pre-trial or upon close of testimony.

29) Plaintiff filed motions to dismiss on the issues in items 27 and 28 defendant failed to act in any favorable nature upon the motions.

30) Defendant neglected to question the government bomb expert from Washington D.C. Justice Department, exactly when did the government's exhibit (bomb) become a bomb under the law charged in the indictment.

31) Defendant failed to cross-examie government's dynimite expert, as to how Bertini could suffer only minor damage, when 5 sticks of dynimite went off in his hand as Bertini testified.

32) Defendant neglected to cross-examie either of the government's two (2) bomb & dynimite experts on their prior testimony in the Bertini trial and to the list of questions submitted to defendant by plaintiff.

33) Defendant neglected to subpeona State Court Judge Author Wessel, who had converted a 2 &½ year consecutive sentence to concurrent for Bertini, upon Bertini's plea of co-operation with government, plaintiff informed defendant of this and requested such.

34) Defendant failed to supeona Attorney Michel Litman, who also represented Bertini, and had obtained a exculpatory statement from Bertini while Bertini was in prison, plaintiff requested this of defendant. This criteria was also listed on the government's cronological report.

35) Defendant neglected to supeona Mr. Carmen Colograndе, who was interviewed by plaintiff's

investigator. Colograndе had exculpatory testimony favorable to plaintiff. Government had given Colograndе immunity, plaintiff requested this vital testimony in letters and orally on numerious occassions.

36) Defendant failed to have testify Mr. Fred Koerner, who had testimony that one, Freedi Edelman had committed suicide, the same Edelman Bertini testified to grand jury minutes, same Edelman eye witnesses described in their testimony for the government. Edelman suicide came immediately upon his learning of Bertini's co-operation with government.

37) Defendant neglected to place before the jury, one sintilla of testimony as to what price the government and society paid for Bertini's perjours testimony.

38) Defendant neglected to place before the court and/or jury one sintilla of evidence or testimony to contridict the government's interstate allegations.

39) Defendant failed to subpeona Mr. Joseph Vento, who had given plaintiff's investigator exculpatory statement, plaintiff requested this on numerious occassions.

40) Defendant neglected to request for a recess or differrment of the introduction of the stolen Swartz credit card testimony against plaintiff until the complete record could be subpeoned from the state court.

41) Defendant neglected to subpeona or have testify one, Timothy Ohrman, who had given investigator a statement under oath exculpating Plaintiff, for Ohrman was in prison with Bertini. Both Plaintiff and investigator informed Defendant of this exculpatory statement prior to trial. Ohrman was under State probation officer's control an easily accessable.

CONCLUSION

The Plaintiffs being grossly aggrieved by the sustained loss of their dearest of kin, have suffered irrepairable harm, both mentally and financially facing public embrassment via the exposure of the Television and newspapers news broadcatst, printing reports of the trial proceedings with the highly publizied conclusion and ultimate sentencing.

Wherefore Plaintiffs, seek punitive and pecuniary damages in the amount of Five Million Dollars ($5,000,000.) jointly and or severally as compensation for the aggreived loss(s) sustained by all.

Wherefore Plaintiffs, seek double and contingent damages sustained as a direct result from the expendature of funds and anxieties endured in the amount of Six Hundred Thousand Dollars ($ 6,000,000.oo) jointly and or severally as compensation for all.

Plaintiffs respectfully request this Honorable Court to direct the Defendant herein to answer the complaint in timely fashion, affording Plaintiff the opportunity to file interrogatories with an ammended complaint upon Plaintiff's receipt of Defendant's respective responses.

Plaintiff's respectfully request this Honorable Court to set a contigent trial date, whereas all parties will benefit by such advanced knowledge setting their respectives schedules accordingly.

MEMORANDUM OF LAW
IN SUPPORT OF COMPLAINT

The United States Supreme Court held in, Haines v Kerner 404 U.S. 519, at 521, a petitioner's pro se complaint cannot be dismissed unless it appears from the record and beyond doubt that plaintiff can prove no set of facts which would entitle him to the relief sought.

The United States Supreme Court held in, Adickers v Kress & Co. 398 U.S. 144, where there are issues of fact involved no summary judgement may be granted, and if granted shall be dismissed.

WHEREFORE Your Plaintiff Respectfully Requests That:

This Honorable Court direct the Defendant to respond in a reasonable time, should said Defendant fail to respond to grant Plaintiff judgement on the pleadings here to with, for the reasons and contentions here to with listed in the afore, Complaint in Negligence Action.

Respectfully Submitted,

_____

Francis Rick Ferri, Plaintiff pro se
Post Office Box 1000
Lewisburg, Pa. 17837

Sworn and Subcribed before me this 17th day of Feb., 1976

/S/ R.M. REISH United States Parole Officer

AFFIDAVIT

After first being duly sworn upon his oath according to law, Francis Rick Ferri, the Plaintiff in this Complaint in Negligence action, desposes and says that, he has read the attached documents labeled, "Complaint in Negligence Action", and swears said contents to be true to the best of his knowlegde, belief and information.

That he files this Complaint in Negligence Action fully believing that he and the Plaintiffs therein are entitled to the damages therein listed, that he is a pro se litigant unlearned in the law seeking just relief from this Honorable Court.

That he files this Complaint in Negligence Action in be-half of all the entitled Plaintiffs fully believing their support is not with-held, that is is acting as a pro se counsel for all the ligigants until counsel recognized by this court files a notice of apperance.

Francis Rick Ferri
Post Office Box 1000
Lewisburg, Pa. 17837

Sworn and Subcribed before me this 17th day of Feb., 1976.

/S/ R.M. REISH

United States Parole Officer

[Certificate of Service Omitted in Printing]

February 23, 1976

Clerk of Courts
Union County Courthouse
2nd & St. Louis Streets
Lewisburg, Pa. 17837

To Whom It May Concern:

Enclosed please find copy of law suit which was mailed to me by my ex-husband of eleven years.

I demand my name and the names of my three children be withdrawn as plaintiffs.

I was not asked by main plaintiff, Francis Rich Ferri to be a co-plaintiff and I do not wish to subject my three children to such an abhorrent action.

I would appreciate action taken immediately.

Respectfully yours,

Lorraine C. Ferri

Lynda M. Ferri, Child

Jeffrey L. Ferri, Child

Richard A. Ferri, Child

IN THE COURT OF COMMON PLEAS
FOR UNION COUNTY
COMMONWEALTH OF PENNSYLVANIA

FRANCIS RICK FERRI
United States Penitentiary
Lewisburg, Pa. 17837

and

CONSTANCE JEAN FERRI
R.D. #1
Boyers, Pa. 16020

and

LUIGI FERRI and
CONCETTA FERRI
535 Allegheny Avenue
Glassport, Pa. 15045

and

Related Parties, Whom
Vested Interests
May Appear,
Plaintiffs,

vs.

DANIEL ACKERMAN, ESQ.
27 North Main Street
Greensburg, Pa. 15601
Respondent.

Civil Action Law
Docket Number

No. 115 1976

PRELIMINARY OBJECTIONS—
FILED MARCH 25, 1976

Defendant files these Preliminary Objections to Plaintiff's Complaint in Negligence, all pursuant to Pa. R.C.P. No. 1017, each based upon the reasons indicated:

PETITION RAISING QUESTION IN VENUE

1. The Complaint, on its face, states that all of the facts out of which the cause of action arose occurred in either Westmoreland County or Allegheny County, and that all transactions or occurrences out of which the alleged cause of

action arose occurred in either Westmoreland County or Allegheny County.

2. Defendant is a lawyer who resides in Westmoreland County. His principal and only professional office is situated in Westmoreland County.

3. No facts are alleged in the Complaint linking Union County to this action in any way. Defendant was never even in Union County.

4. This suit was improperly instituted in Union County. Defendant was served with a copy of the Complaint by the Sheriff of Westmoreland County who was deputized by the Sheriff of Union County.

5. Other Preliminary Objections are raised in this pleading. However, if the Court of Common Pleas of Union County sees fit to sustain this Preliminary Objection raising the issue of venue and transfers the action to Westmoreland County, no further action on any of the other objections is requested.

WHEREFORE, Defendant requests the Court to transfer this action to the Court of Common Pleas of Westmoreland County, Pennsylvania.

PETITION RAISING QUESTION OF JURISDICTION

6. The Complaint, on its face, indicates that the criminal action which gave rise to facts involved in this alleged cause of action is presently on appeal. Questions involving ineffective assistance of counsel under the Sixth Amendment may be raised on direct appeal, and at a post-conviction hearing, or by other collateral attack. (Plaintiff Francis Ferri's criminal case is presently on appeal before the Court of Appeals for the Third Circuit at No. 75-1502.) Until the issue of ineffective assistance of counsel is pursued through procedures afforded by the criminal law process, this Court has no jursdiction in this civil action.

7. Defendant requests that the issues raised in these Preliminary Objections be decided on briefs without the necessity of oral argument.

WHEREFORE, Defendant requests that the Complaint be dismissed with prejudice.

DEMURRER

8. The Complaint fails to state a cause of action upon which the Court may grant relief.

9. Defendant was appointed under the Criminal Justice Act, 18 U.S.C.A. §3006A, et seq., to represent Plaintiff Francis Ferri, who was then indigent. In the capacity he acted, Defendant was and is immune from any civil liability, or from any other liability arising from his conduct of the defense of Francis Ferri.

10. Among other reasons, the Complaint fails to state a cause of action since all of the allegations relate simply to Defendant's judgment in the decisions and choices made in the defense of Plaintiff Francis Ferri, Plaintiff is bound by his defense counsel's judgment and the Complaint states no cause of action by questioning that judgment.

WHEREFORE, Defendant requests the Court to dismiss the Complaint with prejudice.

Respectfully submitted,

George E. Schumacher
Federal Public Defender
421 Seventh Ave., Pgh., Pa. 15219

Ned J. Nakles
1714 Lincoln Avenue, Latrobe, Pa. 15650
Attorneys for Defendant

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF WESTMORLAND } SS.

Before me, the undersigned authority, personally appeared defendant, Daniel Ackerman, who, being duly sworn according to law deposes and says that the facts set forth in the foregoing Preliminary Objections are true and correct to the best of his knowledge, information and belief.

S/DANIEL ACKERMAN

SWORN to and subscribed
before me this 24th day of
March, 1976.

Notary Public

ALMA L. STEINBACK
Notary Public,
Greensburg,
Westmoreland Co.
My Commission Expires
November 4, 1978

[Affidavit of Service Omitted in Printing]

IN THE COURT OF COMMON PLEAS
FOR UNION COUNTY
COMMONWEALTH OF PENNSYLVANIA

FRANCIS RICK FERRI, and CONSTANCE JEAN FERRI, and LUIGI FERRI, and Related Parties, whom Vested Interests May Appear, as *Plaintiffs*	Civil Action Law Docket Number No. 115–1976
–v–	
DANIEL ACKERMAN, ESQUIRE, as *Respondent*	Jury Trial Demanded

AMENDED COMPLAINT

Comes now, Francis Rick Ferri, Plaintiff pro se, filing an 'Amended Complaint' to the above entitled action/cause. Plaintiff amends his original complaint adding the infractions of, Malpractice and Breach of Contract to his original Complaint In Negligence by Daniel Ackerman, Esquire, Respondant, in the above entitled action/cause. Pursuant to the Pennsylvania Rules Of Civil Proceedure, for complaints in Torts and Assumpt Causes.

WHEREFORE Your Plaintiff Respectfully prays that;
This Honorable Court set forth a date for a trial by jury to adjudacate the issues in contention. That should Respondant fail to properly deny the issues of contention in Plaintiff's original and amended Complaint of Negligence, ... Malpractice and Breach Of Contract to grant a judgement on the pleadings.

Respectfully Submitted,

_____

Francis Ferri, Plaintiff pro se
P.O. Box 1000
Lewisburg, Pa. 17837

After first being duly sworn upon his oath, Francis Rick Ferri, Plaintiff pro se files these documents fully believing he is entitled to the relief sought. That he files these documents believing said contents to be true to the best of his ability, knowledge and information.

_____

Francis Rick Ferri, Plaintiff pro se

Sworn and Subscribed Before me This ____ Day of April, 1976

_____ _____

United States Parole Officer Stamp

[Certificate of Service Omitted in Printing]

PLAINTIFF'S TRAVERSE
IN THE COURT OF COMMON PLEAS,
WESTMORELAND COUNTY, PENNSYLVANIA

FRANCIS RICK FERRI,
&
CONSTANCE JEAN FERRI,
&
LUIGI FERRI, and
CONCETTA FERRI,
&
RELATED PARTIES,
Plaintiffs
–vs–
DANIEL A. ACKERMAN,
ESQUIRE,
Defendant

CIVIL ACTION LAW
2633 of 1976

COURT IN BANC
TRAVERSAL BRIEF OF PLAINTIFF—
FILED OCTOBER 18, 1976

PLAINTIFF'S TRAVERSE TO DEFENDANT'S "BRIEF FOR DEFENDANT"

Comes now, the Plaintiff, Francis Rick Ferri unschooled at law, and on behalf of all the Plaintiffs herein, respectfully urges the Court, to note that the main thrust of the Plaintiff's *Pro se Complaint*, is to the inexcusable neglect of the defendant, which may not be charged to the Plaintiff.

Plaintiff further wishes by stipulation herein, to narrow the issues upon which this complaint should be heard, to a specific failure of the defendant to exercise the normal and customary skill in the area, of competent counsel in behalf of a client, in a criminal prosecution. Please take note of *Exhibits 1* and *2*, attached.

Now therefore, the Plaintiff urges the Court to take

Judicial Notice, that the activities of the defendant prior to trial, is the substance of the present cause of action, Therefore, when the defendant failed to assert and protect, the vital and fundamental right of the Plaintiff, not to suffer a criminal prosecution, where the statute of limitations for that prosecution had expired,[1] he was then and there, in the opinion of the Plaintiff, guilty of Malpractice and Non-feasance.

In support of the Plaintiff's complaint, he makes *specific reference* to the Pa. Rules Of Civil Procedure, Articles 3391 and 3393, which provide for (non-discriminatory) Malpractice and Negligence Suits in the State Of Penna., specifically citing attorneys, and also the 1st, 5th, 7th, 6th, 9th and 10th Amendments Of The Constitution, to which Plaintiff is entitled under the "equal protection clause" of the 14th Amendment.

That when the defendant sought for (exhibit 3), obtained and accepted[2] the Plaintiff as his client, he did in fact then and there as a corallary thereto, enter a contractual agreement[3] to zealously guard and protect the interests of the Plaintiff. To provide him with full recourse to the Courts as the law allows a defendant therein, to avail himself thereof.

Wherefore, it is strongly urged, that when the defendant, (which was legally unknown to Plaintiff at that time), failed to protect the lawfull and Constitutional rights of the Plaintiff in so clearly and basic a step, which would have then and there precluded any prosecution whatsoever, the precluded omission thereof besmacks of deliberately evasion of duties, almost to the level of bringing about the possibility of being accused of having conspired with the prosecution to fraudulantly obtain a criminal conviction against the Plaintiff, perhaps in violation of Title 18, Section 241 and 242?

---

[1] Plaintiff filed an, unobjected to, amended complaint, asserting the right inject further acts of the defendant's Negligence, Malpractice, etc. as they became, known for Plaintiff's appellate counsel presented, for the first time, the limitations issued on appeal (No. 75–1502, 3 Cir Ct Of Appeals).

[2] The defendant enjoyed the dicrestionary option of accepting or declining the 'assignment' should same interfer with his active private practice. He accepted receiving $5,100.00 renumeration.

[3] Article 1, Section 10, U.S. Constitution, providing that Obligations of Contracts *shall not* be imparied. The defendant would now have this absolute Constitutional Right violated by the ruse of "absolute immunity".

Since any first year law student would have been alerted, based even though, upon sub-standard level of competance, to so glaring a right as to be protected from an inpermissable and invalid prosecution, thru no more effort than asserting that right.

The defendant would suggest, that he is cloaked with absolute immunity, as are the Legislators, Judges & Prosecutors. Plaintiff believes that, if at all, only a qualified immunity exists, and even that can only be raised as to *judgmental trial tactics and decisions*. When an attorney who under full fee and not on a voluntary self sacrificing service, commits or omits to a client, of normal attention to his interests, which thereby directly and solely causes the Plaintiff to be convicted of a criminal charge and placed in prison, he must be estopped, from denying liability, and from asserting the defense of absolute immunity for the injury done.

Assuredly, the Plaintiff may well have an "ineffective representation by counsel" (as raised by defendant), to be properly raised in a different forum, as an available remedy to pursue. Plaintiff expects to exercise that remedy. However, that issue is no excuse, nor a defense for the defendant, to support an assertion that Plaintiff must be limited, to only that recourse; which of course does not remedy the tort or injury done, in so far as being imprisoned is concerned, etc. That remedy at best, may only reverse the, and set aside, conviction of judgment.

The defendant would also have, what appears to be a balancing test made relating to his position as trial counsel, requiring absolute immunity, in order to protect the integrity of the Judicial Process and the availability of attorneys to serve indigent defendants.

However, even this balancing of interests must include the *trust of the public*[4] in accepting and being held responsible for the acts of one's attorney.

[4]Plaintiff would wish to share this thought with the Court; respectfully,

May the Court now be heard to properly say; that had it obtained the services of a neurosurgeon, to examine the Plaintiff, for physical competency to stand trial, and that neurosurgeon, using a testing needle, caused the Plaintiff to contract hepatitis and inadvertently slipping, struck the Plaintiff's eyeball, thus causing him blindness, thereby-is to be shielded by absolute immunity. No more than this instance, may the defendant be so absolutely shielded.

Needless to say, the final ingredient to this equation must be based upon some line of minimal standards of counsel, below which, responsibility must attach.

It is in this vein that Plaintiff respectfully, points out, if so gross a derelection of duty can be condoned, by the Judiciary then it will not be long, before the Courts shall be enundated with plain untrained citizens demanding their day in court, without being subject to such counsel, which is in form only, and which in fact meets the Mockery, Sham and Farce standards, which even now, is being at long last shredded from the scene.

While the right to proper and full advocacy in an adversarial proceeding before the bar, was and is the absolute right of the Plaintiff and which was injured by the Malpractice, etc. of defendant.

WHEREFORE, the Plaintiff respectfully prays the Court to grant him his day in Court, the right to pursue his Malpractice Suit against the defendant, for the otherwise unremedial injuries done to the Plaintiffs, as well as for the violence done to his Constitutional Rights, by the inexcusable conduct of the defendant.

Respectfully,

_____

Francis Rick Ferri, pro se
P.O. Box 1000
Lewisburg, Pa. 17837

Sworn & subscribed before me this 18th day of Oct., 1976.

_____ _____

United States Parole Officer Stamp

[Affidavit of Service Omitted in Printing]

TRAVERSAL BRIEF: EXHIBIT 1
SUPPLEMENTAL ARGUMENT

VIII. The court was without jurisdiction to prosecute, try and punish Ferri on the Seventh, Eighth and Ninth Counts because the Indictment was not found within the applicable period of limitation. Accordingly, Ferri's conviction on those counts must be vacated and the counts dismissed, and Ferri should be granted a new trial on the remaining counts of the Indictment because of resulting prejudice.

Standard of review: The district court erred in formulating and applying the legal precepts involved.

(a) Since the Seventh, Eighth and Ninth Counts of the Indictment allege violations of the internal revenue laws, the properly applicable period of limitation is the three year period specified by §6531 of the Internal Revenue Code, which period had elapsed before the Indictment was filed.

The seventh, eighth and ninth counts of the indictment describe alleged violations of the internal revenue laws, to wit, of §§5861 and 5871 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §5861 and §5871.

The period of limitation specified in 18 U.S.C. §3282 applies "except as otherwise expressly provided by law". Accordingly, the properly applicable period of limitation here is not the general five year period provided in 18 U.S.C. §3282, but the three year period of limitation made applicable by 26 U.S.C.

TRAVERSAL BRIEF: EXHIBIT 2
ISSUES PRESENTED

1. Whether the evidence was sufficient to support defendant's convictions on counts 1 and 2.

2. Whether there was plain error in the instructions.

3. Whether the court properly refused to allow defendant to plead guilty.

4. Whether defendant's right to a speedy trial was violated.

5. Whether the court committed plain error in allowing the jury to determine if defendant was guilty of the offense of making a destructive device (Count 9) and the offense of possession of an unregistered and illegally made destructive device (Counts 7 and 8).

6. Whether prejudicial error occurred during the testimony of government witnesses Richardson and Sammis.

7. Whether the trial court properly permitted a single trial of defendant with codefendants Matthews and Laverich.

8. Whether defendant waived the defense of the statute of limitations.

STATUTES INVOLVED

18 U.S.C. 844(i) provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty

TRAVERSAL BRIEF: EXHIBIT 3

APPENDIX

INTERNAL OPERATING PROCEDURES

The Board of Juges, though satisfied with the existing approved panel of attorneys available for appointment pursuant to the Criminal Justice Act of 1964, as amended, and the Local Plan, recognizes that criminal cases in the Western District of Pennsylvania will grow in number and complexity. Moreover, that growth will emphasize the importance of the Rule 50(b) Plan for prompt disposition of criminal cases. Finally, the state of the economy of this country might result in larger numbers of persons eligible for and requiring appointed counsel. To the end that indigents shall continue to receive the effective and timely assistance of counsel without undue cost to the Government, these procedures shall become effective upon the appointment of the Federal Public Defender for the Western District of Pennsylvania:

a. Two panels of approved attorneys shall be established, Panel A and Panel B. Panel A shall consist of those attorneys regularly practicing in the Court who have demonstrated their professional integrity, interest, training, ability, and experience in criminal practice and in representing the legally indigent. Panel B shall consist of those attorneys who have asserted an interest in criminal practice and in representing the legally indigent, but whose training, ability, and experience in criminal practice have not been demonstrated and established.

b. An attorney who desires to be listed in an approved panel of attorneys shall apply to the Federal Public Defender and shall have his background and qualifications evaluated by the Federal Public Defender who shall then make a recommendation to the Court and the Magistrates. The Court shall then assign the attorney to the appropriate Panel.

   An attorney in Panel B may, at his request or at the request of the Court, a Magistrate, a local bar association, or the Federal Public Defender, have his background and qualifications evaluated by the Federal Public Defender who shall then recommend whether the attorney may be transferred by the Court to Panel A or should be removed from the approved Panel.

c. Those attorneys listed on the existing panel of approved attorneys shall continue thereon and shall be considered as members of Panel A. An attorney in Panel A may, at his request or at the request of the Court, a Magistrate, a local bar association, or the Federal Public Defender, have his background and qualifications evaluated by the Federal Public Defender who shall recommend whether the attorney should be transferred by the Court to Panel B or removed from any approved Panel.

d. The Federal Public Defender shall make his office available to counsel and advise any private attorney appointed to represent an indigent. Legal research, briefs and memoranda on file in the office of the Federal Public Defender shall be shared with such appointed attorneys as might be ap-

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75–1502

UNITED STATES OF AMERICA

v.

FRANCIS D. FERRI a/k/a Rick
JOSEPH LAVERICH
KENNETH R. MATTHEWS

FRANCIS D. FERRI, a/k.a "RICK"
Appellant

(D.C. Crim. No. 74–277)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 8, 1976

Before VAN DUSEN and ROSENN, *Circuit Judges*, and CAHN, *District Judge*

LEON H. KLINE, ESQ.,
Philadelphia, Pa.
Attorney for Appellant

BLAIR A. GRIFFITH, U.S.
Attorney, Pittsburgh, Pa.;
SIDNEY M. GLAZER, ESQ. &
HOWARD WEINTEAUB, ESQ.,
Attorneys, Department of
Justice, Washington, D.C.;
THOMAS A. CRAWFORD, ESQ.,
Special Attorney, Pittsburgh
Strike Force;
Attorneys for Appellee

JUDGMENT ORDER—FILED NOVEMBER 3, 1976

After considering the issues raised by appellant, to wit:

(1) whether the evidence was sufficient to establish jurisdiction;[1]

(2) whether instructions to the jury were prejudicially erroneous;[2]

(3) whether the defendant's offer to plead guilty was properly denied;[3]

(4) whether there was undue delay of prosecution, in violation of the constitutional and regulatory rights of the defendant;[4]

(5) whether multiple offenses were properly submitted to the jury and multiple punishments imposed;[5]

(6) whether irrelevant and unfairly prejudicial testimony was properly received in evidence;[6]

(7) whether there was misjoinder and prejudicial joinder of defendants;[7]

(8) whether counts of the indictment alleging offenses arising under the internal revenue laws were barred by the applicable statute of limitations, and whether a new trial should be granted because of jury deliberation on those matters;[8]

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[1] See *United States v. Ferri, Matthews, Appellant*, Opinion of 3/3/76 at ¶(3) of note 2 (3d Cir., No. 75–1459). 18 U.S.C. § 844(i) provides:

"Whoever maliciously damages . . . by means of an explosive, any . . . *vehicle . . . used in . . . any activity affecting interstate* or foreign commerce shall be . . . [guilty of a crime]." (Emphasis supplied.)

[2] See note 1 and N.T. 1937–38, 1954–55.

[3] F.R. Crim. P. 11; *Paradiso v. United States*, 482 F.2d 409, 413 (3d Cir. 1973); see also *United States v. Nathan*, 476 F.2d 456, 459 (2d Cir. 1973).

[4] *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *United States v. Ferri*, Crim. No. 74–277 (W.D. Pa. 1974), reproduced at 24a.

[5] *United States v. Ponder*, 522 F.2d 941, 943 (4th Cir. 1975).

[6] *United States v. Stirone*, 262 F.2d 571, 576 (3d Cir. 1958), *rev'd on other grounds*, 361 U.S. 212 (1960).

[7] *United States v. Ferri* (Matthews, Appellant), No. 75–1459 (3d Cir. 1976), cited in note 1 above; *United States v. Armocida*, 515 F.2d 29, 46 (3d Cir. 1975).

[8] *United States v. Kenner*, 354 F.2d 780, 785 (2d Cir. 1966); *Askins v. United States*, 251 F.2d 909, 913 (D.C. Cir. 1958); see also *United States v. Waldin*, 253 F.2d 551, 558–59 (3d Cir. 1958). In *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), the Supreme Court said, "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases. . . ."

it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

/S/ VAN DUSEN
Circuit Judge

Dated: NOV 3 1976

Attest:

Thomas F. Quinn, Clerk

**IN THE COURT OF COMMON PLEAS
OF WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL ACTION—LAW**

FRANCIS RICK FERRI, *Plaintiff*	No. 2633 of 1976
vs.	Before: The Court en Banc on Briefs
DANIEL ACKERMAN, *Defendant*	Sitting en Banc

OPINION AND DECREE—FILED JANUARY 31, 1977

sustaining preliminary objections in the nature of a demurrer and dismissing the original complaint as amended

BY THE COURT EN BANC:

(Opinion by McCormick, J.)

The issue presented in this case is whether a lawyer appointed under the Criminal Justice Act to represent an indigent defendant in a federal criminal case is immune from civil liability at the suit of his own client.

Plaintiff filed this case originally in Union County at Civil Action Docket No. 115, 1976. Defendant objected to the venue and President Judge A. Thomas Wilson of Union County transferred the case to Westmoreland County under Pa. R.C.P. No. 1006 (6).

Plaintiff's *pro se* Complaint seeks monetary damages against defendant, an attorney who represented him in an extended criminal trial. The following facts appear from the Complaint.

Plaintiff was indicted in Federal Court. He was indigent, and the Court appointed defendant to represent him under the Criminal Justice Act, 18 U.S.C. §3006A, et seq. The Complaint generally alleges malpractice on the part of defendant in his capacity as plaintiff's lawyer in the criminal case. It itemizes dozens of alleged incidents, at the jury trial and before, all relating to the management of the criminal defense and the refusal of the defendant to follow plaintiff's instructions.

Defendant filed Preliminary Objections which are presently before the Court en Banc, including a Demurrer and a Petition Raising Questions of Jurisdiction; the same Preliminary Objections were filed to an Amended Complaint which alleged "malpractice and breach of contract."

Defendant makes the following arguments:

1. As a lawyer appointed to represent an indigent in Federal Court, he is immune from civil liability.
2. The Complaint fails to state a cause of action where all of the allegations relate to matters involving the exercise of judgment by a criminal defense lawyer.
3. A state court has no jurisdiction in an action based on ineffective assistance of counsel in Federal Court where that issue could be raised on direct appeal in the criminal case, at post conviction hearing, and by other collateral attack.

Plaintiff argues that defendant is not entitled to immunity, and that his malpractice action should not be dismissed.

Two cases have already considered the same immunity issue raised here and have concluded that a criminal defense lawyer appointed under the Criminal Justice Act enjoys immunity from civil liability. *Sullens v. Carrol*, 446 F. 2d 1392 (5th Cir. 1971); *Jones v. Warlick*, 364 F. 2d 828 (4th Cir. 1966).

Moreover, Public Defenders in Pennsylvania are immune from liability both under state law *(Reese v. Danforth*, Lancaster County, 131 June Term, 1975, affirmed p.c. 460 A. 2d 629) and under federal law *(Brown v. Joseph*, 463 F. 2d 1046 [3d Cir. 1972]).

In *Waits v. McGowan*, 516 F. 2d 203 (3d Cir. 1975) the Third Circuit held that a New Jersey public defender was immune from civil liability. In *John v. Hurt*, 389 F. 2d 786, 788 (7th Cir. 1973), a public defender was likewise held immune from liability in an action by the criminal defendant he represented. The court there held that even if defendant were so incompetent as to deprive his client of Sixth Amendment rights:

> ". . . we think that, as a matter of law, defendant is immune from liability for damages, and plaintiff's complaint must fail."

We conclude that the case law and strong public policy requires that defendant, as a lawyer appointed to represent an indigent defendant in Federal Court, must be immune from liability for damages.

The cases express a variety of reasons to support the doctrine of immunity. *Brown v. Joseph*, supra, concluded that if defense counsel were subjected to liability, sensitive and thoughtful members of the bar would hesitate taking positions as defenders, and experienced defenders might reconsider their positions. The potential imposition of civil liability would discourage lawyers from accepting appointments to represent criminal defendants. Fewer lawyers accepting criminal cases would be harmful to the judicial system. The ABA Standards, *The Defense Function* (Approved Draft 1971) p. 187, states:

> "Wide participation in the defense of criminal cases is important to the health of the administration of criminal justice and to the fulfillment of the bar's obligation to insure the availability of qualified counsel to every accused."

Even after an appointment is accepted in the defense of a criminal case, the possibility of civil liability would have a "chilling effect" on defense counsel, inhibiting the vigorous defense his client deserves. He would be required to measure every word in terms of his own personal liability. See *Ehn v. Price*, 372 F. Supp. 151, 153 (N.D. Ill. E.D. 1974); *Brown v. Joseph*, supra, 463 F. 2d 1046, 1048-1049 (3d Cir. 1972). Judge Learned Hand spoke of the "constant dread of retaliation" to justify prosecutorial immunity in *Gregiore v. Biddle*, 177 F. 2d 579, 581 (2nd Cir. 1949).

The United States Supreme Court recently held a state prosecutor immune even where he used false testimony and withheld exculpatory information. *Imbler v. Pachtmen*, 47 L. Ed. 2d 128, 141 (1976). The Supreme Court stated that the accurate determination of guilt or innocence:

> ". . . requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of the evidence."

The judge and the prosecutor are immune from liability. The defense counsel must also be immune. ABA Standards, *The Defense Function* (Approved Draft, 1971), 1.1 (a), sets out the position of the defense lawyer:

> "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused."

Because we have concluded that defendant is immune from civil liability, his Preliminary Objection in the nature of a Demurrer is sustained, and the Complaint will be dismissed. With this disposition, there is no need to consider the other issues in the case.

ORDER OF COURT

AND NOW, to wit: the 31st day of January, 1977, after due and careful consideration of the pleadings and briefs presented in this matter, it is hereby ORDERED, ADJUDGED and DECREED that Defendant's Preliminary Objections in the nature of a Demurrer are hereby sustained, and the Original Complaint as amended is dismissed.

BY THE COURT:

s/RICHARD E. MCCORMICK
Judge

CONCURRING:

s/DAVID H. WEISS
President Judge

s/L. ALEXANDER SCULCO
Judge

Attest:

_____

Prothonotary

No. 1439/1977

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN

In the Superior Court of Pennsylvania

No. 676 April Term, 1977

Appeal from the Order of the Court of Common Pleas, Civil Action-Law, of Westmoreland county, at No. 2633 of 1976.

PER CURIAM: FILED: FEB 15 1978

Order affirmed.

SUPERIOR COURT OF PENNSYLVANIA
Sitting at Pittsburgh

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN

No. 676. April Term, 1977

ORDER

AND NOW, this 15th day of February, 1978, it is ordered as follows:

X Order Affirmed.

_____ Order Reversed.

_____ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order Modified as set forth in opinion filed herewith.

_____ Ordered as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

_____ Costs to be taxed as provided in opinion filed herewith.

BY THE COURT

_____

Irma T. Gardner
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing order was entered on the docket on the date set forth above.

Order entered:_____.

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN,
Apellee

No. 98 March Term 1978

Appeal from the Order of the Superior Court of Pennsylvania at No. 676 April Term, 1977, affirming the order of the Court of Common Pleas, Westmoreland County, Sitting en banc at No. 2633 of 1976.

OPINION—FILED: NOV 18, 1978

NIX, J.

This is an appeal from an order of the Superior Court affirming an order of the Westmoreland County Court of Common Pleas sitting *en banc* which had sustained appellee's preliminary objections in the nature of a demurrer and dismissed the complaint.[1] Appellant filed this case originally in Union County, and after an objection to venue was interposed by the appellee the matter was transferred to Westmoreland County under Pa. R. C. P. 1006 (e). Appellant's complaint pursuant to the Criminal Justice Act, 18 U.S.C. § 3006 a (1978), to represent appellant in a criminal prosecution in the federal district court. In that trial, appellant was convicted by a jury and received a sentence of thirty years. In the complaint filed in the malpractice action appellant set forth numerous acts of omission during the pre-trial, trial and post-trial periods of representation.

The question presented in this appeal is whether a lawyer appointed under the Federal Criminal Justice Act, 18 U.S.C. §3006(a) (1978), to represent an indigent defendant in a federal criminal case is immune from tort liability based upon

[1] Jurisdiction for this appeal is based on section 204(a) of the Appellate Court Jurisdiction Act, July 31, 1970, P.L. 673, No. 223, art. II, §204(a), 17 P.S.

the alleged failure on the part of that attorney to raise the statute of limitations which allegedly would have barred prosecution for some of the ancillary counts of the indictments.[1] Appellant argues that any immunity that may be enjoyed by one standing in the position of appellee does not insulate against liability for gross negligence. He further argues that the assertion of a plea in bar based upon the expiration of the statute of limitation does not entail the type of exercise of judgment which requires immunization. Thus we must determine whether there is an immunity that protects appellee in this situation and the extent of that protection, if it exists.

Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope. *Howard v. Lyons*, 360 U.S. 593 (1959). *See also Carter v. Carlson*, 447 F.2d 358, 361-62 n.5 (D.C. Cir. 1971); *Chandler v. O'Bryan*, 445 F.2d 1045, 1055 (10th Cir. 1971); *Garner v. Rathburn*, 346 F.2d 55, 56 (10th Cir. 1965). As noted by the United States Supreme Court in *Howard v. Lyons, supra*, the very nature of a ruling of privilege requires reference to the law of the sovereign creating it for a determination of its nature and scope.

> "The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances as to statements made in the course of duty is one designed to promote the effective functioning of the Federal Government. No subject could be one of

[1] Although the complaint set forth numerous instances in which it charged malpractice appellant has confined his complaint in this appeal to the failure to plead the statute of limitations. Appellee charges that this issue was not properly pleaded and thus should not be considered. It is quite true that in the initial complaint this allegation was not made. Appellant filed a second pleading entitled, "An Amended Complaint" which also failed to set forth the charge. However, appellant subsequently filed what he termed a, "Traversal Brief of Plaintiff" wherein the question of failure to plead the statute of limitations was specifically raised. In view of the fact that these pleadings were filed without the benefit of counsel and the question was clearly raised in the court below, we decline to dispose of the issue based upon this procedural irregularity. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972). *See also* Note, *the United States Courts of Appeals: 1976-77 Term Criminal Law and Procedure*, 66 George. L. J. 203, 488 n. 1565 (1977).

more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States. *Cf. Clearfield Trust Co. v. United States*, 318 U.S. 363, 87 L.ed 838, 63 S. Ct. 573. We hold that the validity of petitioner's claim of absolute privilege must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress." *Id.* at 597.

The doctrine of common law judicial immunity was first adopted by the United States Supreme Court in the cases of *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1886), and *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871). In *Randall, supra*, an action was brought by a plaintiff who was formerly a member of the bar of the Commonwealth of Massachusetts against one of the judges of the court of that State for an alleged wrongful removal of his name from the rolls of attorneys eligible to practice in that jurisdiction. In holding that an entry of judgment in favor of the defendant in that case was proper, the United States Supreme Court stated:

"Now, it is a general principle applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority, it has been held that they are protected only when they act within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jursidction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly. This doctrine is as old as the law, and its maintenance is essential to the impartial administration of justice. Any other doctrine would necessarily lead to the degradation of the judicial authority and the destruction of its usefulness. Unless judges, in administering justice, are uninfluenced by considerations personal to themselves, they can afford little protection to the citizen in his person or property. And uninfluenced by such considerations they cannot be, if, whenever they err in judgment as to their jurisdiction, upon the nature and extent of which they are constantly required to pass, they may be subjected to prosecution at the instance of every party imagining himself aggrieved, and called upon in a civil action in another tribunal, and perhaps before an inferior judge, to vindicate their acts.

This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries, and in this country ever since its settlement."

Id. at 535-36

The Court further observed:

"In the United States, judicial power is vested exclusively in the courts. The judges administer justice therein for the people, and are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called upon to account by impeachment, and removed from office. In some States, and Massachusetts is one of them, they may be removed upon the address of both houses of the legislature. But responsible they are not to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly."

Id. at 537.

It is significant that in *Randall*, the Court was concerned with the privilege surrounding the acts of a state jurist in a state proceeding. It is apparent that at that point in the development of the doctrine the Court did not perceive a difference between the federal privilege and the immunity afforded by the states to its judges. The absolute immunity announced for judicial officers was then perceived by the Court as a universally accepted concept in both the state and federal systems.

Four years after *Brigham*, in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872), a case involving a justice of the Supreme Court of the District of Columbia, Justice Field employed virtually the same theory as being applicable to a federal judicial officer.

"[The complaint here established] that the order for the entry of which the suit is brought, was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however er-

roneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would estroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, 'a deep root in the common law.'

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the Subject of Judicial inquiry."

Id. (footnotes omitted)

The doctrine of common law judicial immunity has continued to be embraced in the federal system to the present day. See *O'Bryan v. Chandler*, 496 F. 2d 403 (10th Cir. 1974); *Garfield v. Palmieri*, 297 F. 2d 526, 527 (2nd Cir. 1962); *Meredith v. Van Oosterhout*, 286 F.2d 216, 221-22 (8th Cir. 1960). The protection afforded is absolute and comprehensive as to all acts allegedly performed within the scope of the judge's official duties.

The common law also recognized a need to extend this protection to other participants in judicial proceedings. One of the first American decisions to recognize an immunity for a prosecutor was *Griffith v. Slinkard*, 146 Ind. 117, 44 NE 1001 (1896). In that case a suit in damages charged that the prosecutor maliciously and without probable cause added plaintiff's name to a grand jury true bill after the grand

jurors had refused to indict him. As a result of the prosecutor's actions plaintiff was arrested and forced to appear in court on several occasions before the charge finally was nolle prossed. The Supreme Court of Indiana dismissed the damage suit on the ground that the prosecutor was absolutely immune. The *Griffith* rule was followed by a clear majority of the states. *Smith v. Parman*, 101 Kan. 115, 165 P 663 (1917); *Semmes v. Collins*, 120 Miss. 265, 82 So. 145 (1919); *Kittler v. Kelsch*, 56 N.D. 227, 216 N.W. 898 (1927); *Watts v. Gerking*, 111 Ore. 655, 228 P. 135 (1924) (on rehearing). The principle was embraced in the federal system in 1926. *Yaselli v. Goff*, 12 F.2e 393 (1926). In *Yaselli*, plaintiff sought damages alleging that a Special Assistant to the Attorney General of the United States maliciously and without probable cause procured an indictment against him by introducing false and misleading evidence. The *Yaselli* Court held, "[t]he immunity is absolute, and is grounded on principles of public policy" *Id.* at 406. In discussing the development of the common-law immunity of a prosecutor the United States Supreme Court, after recognizing the authority of *Yaselli*, *supra*, stated:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."
>
> *Imbler v. Pachtman*, 424 U.S. 409, 422-23 (1976)[2]

Our research has located two federal cases discussing the immunity of federally-appointed criminal defense attorneys.

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[2] We note that some of the language in *Imbler* has been interpreted as leaving open the question as to whether the prosecutor enjoys an absolute privilege when he is acting in the role of an administrator or investigative officer. *See e.g.* Briggs v. Goodwin, 569 f.2d (10th Cir. 1977). The legitimacy of this distinction in this inquiry is questionable since the language relied upon in *Imbler* was in a discussion of the applicability of the common-law rule of immunity under §1983 (42 U.S.C.S. §1983). See n. 3, infra. This question need not detain us here since the challenged conduct related to counsel's advocacy in the judicial processing. Thus, even if we were to accept the legitimacy of this qualification as being applicable to common-law immunity, the qualification would not be appropriate under the facts of the instant case.

Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); *Jones v. Warlick*, 364 F.2d 828 (4th Cir. 1966). The decision in *Jones*, *supra*, was a per curiam opinion affirming a summary judgment in favor of the federal defense attorney. The Fourth Circuit in *Jones* based its decision, *inter alia*, upon the reasoning expressed in *Bradley v. Fisher*, *supra*, and *Yaselli v. Goff*, *supra*. In *Sullens v. Carroll*, 446 F.2d 1392 (5th Cir. 1971), the Court of Appeals for the Fifth Circuit held that court appointed attorneys are immune from civil liability. *Sullens* relied on *Jones v. Warlick*, *supra*.

Sullens and *Jones* are the only cases out of the federal courts of appeals which concern the immunity of federal appointed defense attorneys with reference to their representation in a federal proceeding.[3] We are provided with further guidance on this issue by the recent holding of the United States Supreme Court in *Butz v. Economou*, 46 L.W. 4952 (June 29, 1979), which held some federal executive officials were entitled only to qualified immunity, but that federal agency attorneys presenting actions were absolutely immune from civil liability. The Court made the following observations concerning participants in the judicial process:

> "The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the *Bradley* Court suggested, 13 Wall. (80 U.S.), at 348-349, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. *See Pierson v. Ray*, *supra*, at 554. Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."
>
> *Butz. v. Economou*, 42 L.W. 4952, 4961 (June 29, 1978)

It is therefore apparent that an absolute and comprehensive immunity surrounded appellee in the handling of appellant's trial. The qualifications appellant would have us

[3] We need not here consider the applicability of the common-law immunity in damage actions against state officials under the Civil Rights Act of 1871, now Section 1983 of Title 42 of the United States Code. *See generally*, Weissman, *The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies*, 69 N.W. L. Rev. 489, 528–36 (1974).

engraft upon the immunity have not been recognized by the federal courts in their application of the doctrine. We are therefore satisfied that the dismissal of appellant's complaint was appropriate.

The order of the Superior Court affirming the order of the trial court *en banc*, sustaining the demurrer and dismissing the complaint is hereby affirmed.

Mr. Justice MANDERINO concurs in the result.

Mr. Justice ROBERTS filed a dissenting opinion in which Mr. Justice LARSEN joins.

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

FRANCIS RICK FERRI, *Appellant* v. DANIEL ACKERMAN	No. 98 March Term, 1978 Appeal from the Order of the Superior Court of Pennsylvania at No. 676 April Term, 1977, affirming the Order of the Court of Common Pleas, Westmoreland County, Sitting en Banc at No. 2633 of 1976.

DISSENTING OPINION—FILED: NOVEMBER 18, 1978

ROBERTS, J.

The majority holds that private counsel appointed to represent an indigent defendant in a federal criminal case enjoys the same immunity as a federal official carrying out his official duties. The only cases cited in support of this conclusion, however, fail to provide any analysis justifying this extension of federal immunity.

In describing the rationale underlying the doctrine of official immunity, the United States Supreme Court in *Butz v. Economou*, ___U.S. ___, ___ S. Ct.___, 46 L.W. 4952 (1978), emphasized:

> "[T]he injustice, particularly in the absence of good faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; [and] the danger that the threat of such liability would deter his willingness to execute his office with the deciveness and the judgment required by the public good."

Id. at 4957 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240, 94 S. Ct. 1683, 1688 (1974). Neither rationale applies to private appointed counsel. An appointed counsel does not need any more discretion, freedom, or encouragement to exercise his professional judgment and skill than does privately retained counsel.

Further, under federal law, defense attorneys who participate in trials in state courts are not thereby acting under color of state law for purposes of 42 U.S.C. §1983. See, e.g., *Thomas v. Howard*, 455 F.2d 228, 229 (3d Cir. 1972) (appointed counsel was "performing his duties solely for appellant, to whom he owed the absolute duty of loyalty, as if he were a privately retained attorney"). I would interpret federal immunity law in this light and would hold that attorneys appointed to represent defendants in federal court do not, merely by that representation or appointment, acquire status as a federal official entitled to immunity.

Finally, the majority's result raises a serious equal protection issue. Those who cannot afford private counsel are denied a remedy for inadequate representation which is apparently available to those who can afford privately retained counsel. Furthermore, the denial of such a remedy must be viewed as establishing a lower standard of care for appointed counsel.

I would, therefore, reverse the order of the Superior Court.

Mr. Justice Larsen joins in this dissenting opinion.

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

FRANCIS RICK FERRI,
Appellant

v.

DANIEL ACKERMAN

No. 98 MARCH TERM, 1978

JUDGEMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the Superior Court, be, and the same is hereby affirmed.

BY THE COURT:

Sally Mrvos, Esquire
Prothonotary

Dated: November 27, 1978

Supreme Court of the United States

No. 78-5981

FRANCIS RICK FERRI,

Petitioner,

v.

DANIEL ACKERMAN

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of Pennsylvania, Western District.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for write of certiorari be, and the same is hereby, granted.

February 21, 1979

IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS RICK FERRI,
Petitioner

vs.

DANIEL ACKERMAN,
Respondent

No. 78-5981

On Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

BRIEF OF RESPONDENT IN OPPOSITION

NED J. NAKLES
1714 Lincoln Avenue
Latrobe, Pennsylvania 15650

GEORGE SCHUMACHER
Center City Tower
650 Smithfield St.
Pittsburgh, Pa. 15222

Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

FRANCIS RICK FERRI, Petitioner	)	
vs.	)	No. 78-5981
DANIEL ACKERMAN, Respondent	)	

On Petition for Writ of Certiorari
to the Supreme Court of Pennsylvania

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of Pennsylvania in this case is published in 394 A.2d 553 (Pa. 1978). A copy of that opinion is attached to this brief.

Question Presented

Whether a lawyer appointed to represent an indigent defendant in a federal criminal case is immune from civil liability in a state malpractice action brought by his own client.

Statement of the Case

This case is a state malpractice action by a dissatisfied criminal defendant against his defense lawyer.

INDEX

The trial court of Westmoreland County, Pennsylvania, sitting en banc, sustained defendant's demurrer, and dismissed the complaint. The Superior Court of Pennsylvania affirmed the trial court per curiam. The Supreme Court of Pennsylvania also affirmed the dismissal of the complaint. Ferri's Petition for Writ of Certiorari seeks review of the decision of the Pennsylvania Supreme Court.

The following facts are stated in the complaint. Plaintiff was named in a criminal indictment in the United States District Court for the Western District of Pennsylvania. He was indigent. Defendant Ackerman was appointed as criminal defense counsel to represent plaintiff. The appointment was made under the Criminal Justice Act.

The complaint then alleged a long series of negligent acts on the part of the defense counsel (both acts of omission and commission) at the pre-trial proceedings and at the jury trial. The allegations are set out in great detail in 68 separate paragraphs. They all relate to the technical aspects of the management of the criminal defense, and generally complain that defendant refused to follow plaintiff's instructions.

The complaint also sets forth that plaintiff was serving a prison term that had 8 more years to run, and that he is aggrieved by the additional imprisonment that would result from the sentencing in the criminal case involved. He

seeks "punitive and pecuniary damages" of $5,000,000 and "double and contingent damages" of $600,000.

Plaintiff originally joined as plaintiffs his former wife, Lorraine C. Ferri, and his 3 children. Lorraine C. Ferri filed a document declining to be a plaintiff and stating that she did not wish "to subject my three children to such an abhorrent action."

Plaintiff also filed an amended complaint briefly alleging in general terms "Malpractice and Breach of Contract".

Defendant Ackerman filed preliminary objections to both the original complaint and the amended complaint. The objections were in the nature of a demurrer and raised the question of jurisdiction.

The court en banc sustained the demurrer and dismissed the complaint, holding that defendant was immune from civil liability.

The Superior Court of Pennsylvania affirmed the order of the lower court in a per curiam opinion.

The Supreme Court of Pennsylvania granted Ferri's petition for allowance of appeal and affirmed the dismissal of the complaint, holding that Ackerman was immune from civil liability.

Summary of the Argument

A lawyer appointed under the Criminal Justice Act to represent an indigent defendant in a federal criminal case

is immune from tort liability. The rule of immunity is based upon case law and compelling public policy considerations. It permits the criminal defense lawyer utmost freedom in efforts to secure justice for his clients. Any opposite rule would discourage lawyers from representing indigent defendants.

Argument

I.

The Supreme Court of Pennsylvania held in this case that a lawyer appointed under the Criminal Justice Act to represent an indigent defendant in a federal criminal case is immune from civil liability in a state action brought by a dissatisfied client. The Pennsylvania court looked to federal law to determine the existance and extent of the immunity.

The Supreme Court of the United States recently reviewed the doctrine of absolute immunity for participants in judicial proceedings, and held that such immunity is properly based on sound reasons of public policy. Butz v. Economou, 46 L.W. 4952 (June 29, 1978). While holding that some federal executive officials are entitled only to qualified immunity, it said, as to those involved in the judicial process:

> "...[C]ontroversies sufficiently intense to erupt in litigation are not easily capped by judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. .....Absolute immunity is thus necessary to

> assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." 46 L.W. at 4961. (Emphasis supplied.)

All persons involved in the judicial process must be free to act without fear of liability in a civil suit. Judges must be independent to render decisions without apprehension of suit from disappointed parties. Criminal defense lawyers must be allowed to provide a vigorous defense to persons accused of crime without diverting their energies to protecting themselves from potential personal liability.

Two decisions specifically hold that court-appointed counsel in federal criminal cases are immune from civil liability. Sullens v. Carroll, 446 F.2d 1392 (5th Cir. 1971); Jones v. Warlick, 364 F.2d 828 (4th Cir. 1966).

In the Sullens case, 446 F.2d at 1393, the Fifth Circuit stated:

> "The court below awarded summary judgment on grounds that court-appointed counsel for defendants in federal criminal cases are immune from suit the same as federal officials are. The Fourth Circuit so held in Jones v. Warlick, 4th Cir. 1966, 364 F.2d 828, for reasons more fully stated in the comprehensive unpublished opinion of Circuit Judge J. Spencer Bell, sitting

by designation. We have examined the authorities cited in those opinions...and we agree that the immunity doctrine is applicable."

See also O'Brien v. Colbath, 465 F.2d 358, 359 (5th Cir. 1972).

Jones v. Warlick, supra, 364 F.2d 828, is a Fourth Circuit case specifically holding that a court-appointed lawyer in a federal criminal case is immune from civil liability. There, a federal prisoner sued a judge, an F.B.I. agent, and his own court-appointed lawyer. The per curiam opinion found all 3 immune and affirmed the trial court based upon an unpublished opinion of Circuit Judge J. Spencer Bell sitting in the district court by special designation. (A copy of the unpublished opinion is attached as an appendix to this brief). Judge Bell held, that the attorney appointed by the court to represent an indigent defendant in a federal criminal case was a federal officer and immune from civil liability. He cited Barr v. Matteo, 360 U. S. 564, 569, 3 L.Ed. 2d 1434, 79 S.Ct. 1335 (1959) and 8 other cases.

Several civil rights cases[1] have considered the immunity of public defenders from tort liability.

[1]Actions by criminal defendants against their own lawyers are frequently brought under the Civil Rights Act which provides remedies for deprivation of constitutional rights by persons acting under color of state law. 42 U.S.C.A. §1983. The sweeping language of the Civil Rights Act making "every person" subject to such liability has been held not to abrogate common law immunity accorded to the actions of certain persons, especially those involved in the judicial process. Tenney v. Brandhove, 341 U.S. 367, 376, 95 L.Ed. 1019 (1951) (legislators); Pierson v. Ray, 386 U.S. 547, 554-555, 18 L.Ed. 2d 288 (1967) (judges);

In Brown v. Joseph, 463 F.2d 1056, 1048, 1059 (3d Cir. 1972), cert. den. 412 U.S. 950 (1973), the Third Circuit held an Allegheny County Public Defender immune of civil liability. In a well-reasoned opinion, the court said specifically:

"... a County Public Defender, created under the Pennsylvania statute, enjoys immunity from liability."

The Third Circuit's rationale included the following:

"... To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording the minutes, the presiding judge, and counsel of a co-defendant, privately retained or court-appointed, would be to discourage recruitment of sensitive and thoughtful members of the bar."

New Jersey public defenders were also held immune

and Imbler v. Pachtman, 424 U.S. 409, 424, 47 L.Ed. 2d 128, 140 (1976) (state prosecuting attorney). Consequently, civil rights cases provide good authority for determining the immunity of specified officials from tort liability under the common law, Imbler v. Pachtman, supra, 47 L.Ed.2d at 137, inasmuch as an official who is immune at the common law is also immune under the Civil Rights Act.

from suit in a later Third Circuit case reaffirming Brown v. Joseph. Waits v. McGowan, 516 F.2d 203, 205 (3d Cir. 1975).

A criminal defendant sued the public defender representing him in the Seventh Circuit case of John v. Hurt, 489 F.2d 786, 788 (7th Cir. 1973). The court there held the defense lawyer immune even if incompetency could be proved. The court said:

> "Assuming, however, that defendant could be deemed to be acting under color of state law, and allowing for the possibility that plaintiff's proof might demonstrate such imcompetency as to amount to deprivation of sixth amendment rights, we think that, as a matter of law, defendant is immune from liability for damages, and plaintiff's complaint must fail."
>
> (emphasis supplied.)

In Minns v. Paul, 542 F.2d 899 (4th Cir. 1976), the Fourth Circuit granted absolute immunity to a court-appointed criminal defense attorney in an action brought by his own client. The court relied on the reasoning of the Third Circuit in Brown v. Joseph, 463 F.2d at 1048-49. The Minns case also noted that indigent defendants frequently commence non-meritorious proceedings:

> "...[I]ndigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties." 542 F.2d 899, 902.

Resentment of unsuccessful litigants leaves an attorney "peculiarly vulnerable", and the court observed, in keeping with the Imbler decision:

> "Unless immunity is absolute, an attorney in Paul's position would not be totally free to exercise his best judgment in representing his client because he would be constrained to weigh every decision in terms of potential liability."

The Ninth Circuit case of Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977), accorded absolute immunity to a deputy public defender at the suit of his client. The Miller case adopted much of the reasoning of the Fourth Circuit in the Minns decision.

The Seventh Circuit spoke of qualified immunity for the criminal defense lawyer in John v. Hurt, 489 F.2d 786 (7th Cir. 1973), but that case was decided before the Imbler holding dictated the grant of absolute immunity. The Seventh Circuit, after Imbler, holds that a criminal defense lawyer is entitled to absolute immunity. Caruth v. Geddes, 443 F.Supp. 1294 (1978); Robinson v. Bergstrom,

F.2d (7th Cir. June 13, 1978). (The Robinson case contains a thorough review of the law of absolute immunity for the criminal defense lawyer.)

In Walker v. Kruse, 484 F.2d 802 (7th Cir. 1973), the court considered a diversity malpractice action brought by a prisoner against the court-appointed lawyer designated to assist him in a state criminal case. The Seventh Circuit was convinced that the Illinois courts would dismiss the complaint for a number of reasons; one of which was that Illinois might require an allegation of innocence, and that plaintiff did not allege his innocence. The Walker case then dismissed the complaint against the defense lawyer, and made this observation on the defense of immunity:

> "Moreover, there are strong reasons of pclicy which might persuade the Illinois courts to hold that a lawyer, who has been appointed to serve without compensation in the defense of an indigent citizen accused of crime, should be immune from malpractice liability." 484 F.2d at 804.

Finally, Morrow v. Igleburger, 67 F.R.D. 675, 681 (S.D. Ohio, W.D. 1974), specifically held public defenders immune:

> "...The protection afforded by the judicial immunity doctrine has also been specifically extended to public defenders."

The court dismissed the claim against the defense lawyers for failure to state a claim upon which relief can be granted. 67 F.R.D. at 682.

The result reached under Pennsylvania law is the same. The recent decision of the Superior Court in Reese v. Danforth, decided per curiam, 241 Pa. Superior Ct. 604, 360 A.2d 629 (1976), affirmed the decision of the Lancaster County Common Pleas court which held that public defenders "are immune from liability for damages".

The authority of the cases in this section compel the conclusion that defendant Ackerman, appointed under the Criminal Justice Act to represent an indigent criminal defendant, is immune from tort liability.[2] His demurrer was properly sustained.

II

The Criminal Defense Lawyer Must Be Immune From Tort Liability To Permit Him Utmost Freedom In Efforts To Secure Justice for His Clients; the Rule of Immunity Is Also Necessary To Encourage Lawyers To Accept Assignment

---

[2] "The rule of absolute immunity from civil liability for the criminal defense lawyer is firmly implanted in the emerging case law." Nakles, "Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability." 81 Dick. L. Rev. 229, 234 (1977).

To Represent Indigent Defendants

Important public policy considerations dictate that a criminal defense lawyer appointed to represent an indigent client be immune from tort liability at the hands of his client. The policy is well-founded in reason and is necessary to the effective and fair administration of criminal justice.

The role of the defense lawyer, perhaps more than the judge or the prosecutor, requires freedom of action. He must be free to provide a vigorous and fearless defense of those accused of crime. Often the courtroom climate is hostile to his efforts when he represents an unpopular client. As he exerts every effort to provide adequate representation required by the Constitution, he should not be called upon to measure his words in relation to the personal consequences of a damage suit from an unsatisfied client.

It is a salutory public policy that those accused of crime should have proper representation regardless of their wealth or poverty. This policy would be seriously undermined if defense counsel were subjected to potential tort liability arising out of the decisions made in the conduct of the defense. If even a portion of his energies were diverted from the important task of defending his

client to a consideration of his own possible liability, the client would receive a defense less effective than that to which he is entitled.

Finally, and far more important, if a damage suit could be visited upon a court-appointed lawyer from any disgruntled client, who would serve as appointed counsel?

Without the rule of immunity for court-appointed counsel, courts would find many effective lawyers unwilling to undertake the defense of indigent clients. That would hamper the effective administration of the criminal justice system. Indigents accused of crimes would be prejudiced by the lack of effective counsel to represent them, and the public would suffer the harm.

A district court in Wisconsin recently held that an attorney might be liable for malicious use of garnishment proceedings because such liability in no way chills his duty to represent his client with zeal. U. S. General, Inc. v. Schroeder, 400 F.Supp. 713, 717 (E.D. Wisc. 1975). But even there, the court recognized the public policy need for immunity for lawyers:

> "Despite the foregoing, it is clear that as a general proposition, attorneys are held to be immune from civil liability under 42 U.S.C. §1983, even if their clients

are not. [Citing cases] The Court recognizes that this principle of immunity is grounded upon critical social considerations, for, if an attorney must work in constant fear of civil liability, it is the rights of the public that will suffer. Any such threat of liability visits an obvious chilling effect upon the attorney's enthusiasm to vigorously defend his client's position. [Case cited] The remedies guaranteed by the Civil Rights Act are not to be invoked so as to create a conflict between the attorney's duties to protect himself and to zealously represent his client. Ehn v. Price, 372 F.Supp. 151 (N.D. Ill. 1974). As a matter of public policy, the attorney must not be placed in a position where he is compelled to gamble on the outcome of a case, with his own personal liability hanging in the balance."

The cases which speak in terms of the "chilling effect" of potential tort liability on the tactics of defense counsel understand fully the practical result of withholding immunity from the criminal defense lawyer. See Brown v. Joseph, supra, 463 F.2d at 1049; John v. Hurt,

supra, 489 F.2d at 788.

In Brown v. Joseph, supra, 463 F.2d 1046, 1048-1049 (3d Cir. 1972), Judge Aldisert extended the judicial immunity which protected judges and prosecutors to defense counsel as well. He reasoned that if "free exercise of professional discretion" applied to immunize prosecutors, it applied with equal force to counsel for the accused. He held:

> "There are other considerations of public policy. First, there is the desirability of encouraging able men and women to assume Public Defender roles. To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of court recording the minutes, the presiding judge, and counsel of a co-defendant, privately retained or court appointed, would be to discourage recruitment of sensitive and thoughtful members of the bar...To deny immunity to the Public Defender and expose him to this potential liability would not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions."

Immunity from civil tort liability for the criminal defense lawyer does not mean that he operates outside the law and free of its rules. He is still subject to disciplinary procedures by bar associations, and to criminal process for actions amounting to crimes as defined by criminal statutes. Imbler v. Pachtman, supra, 47 L.Ed. 2d 128, 143 (1976).

Further, the criminal defendant is not left without an adequate legal remedy:

> "Vindication of allegedly invaded federal rights may be aserted by direct appeal, by state post conviction remedies, and by federal habeas corpus petition." Brown v. Joseph, supra, 463 F.2d 1046, 1049 (3d Cir. 1972).

In the present case, if Plaintiff Ferri were correct that he was given ineffective assistance of counsel, he would get a new trial for that reason. Since he was serving the final 8 years of a 10 year term at the time of his conviction involved here, obviously he will have suffered no damage from Mr. Ackerman's representation.

The Supreme Court of the United States recently held a state prosecutor absolutely immune from an action

for damages for wrongful prosecution and imprisonment, even where the prosecutor knowingly used perjured testimony, and deliberately withheld exculpatory information. Imbler v. Pachtman, supra, 424 U.S. 409, 426, 47 L.Ed. 2d 128, 141 (1976). Most of the Supreme Court's policy reasons for prosecutorial immunity applied with equal wisdom to justify the immunity of defense counsel. For example, the Court reasoned:

> "Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence." (Emphasis supplied.)

Only the immunity issue has been argued in this Brief. Respondent does not waive the other arguments made in the Supreme Court of Pennsylvania.

Conclusions

The Petition for Writ of Certiorari should be denied. The opinion of the Supreme Court of Pennsylvania simply followed federal law in determining that

Ackerman was immune from civil liability.

There are no special or important reasons for granting the petition.

Respectfully submitted,

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Certificate of Service

I hereby certify that I served a copy of the Brief for Respondent in Opposition on petitioner Francis Rick Ferri, P. O. Box 1000, Lewisburg, Pa. - 17837, by ordinary mail, sent postage prepaid from Latrobe, Pennsylvania, on February 2, 1979.

Ned J. Nakles

Ned J. Nakles
Counsel for Respondent

Dated:

February 2, 1979

THE OPINION IN FERRI V. ACKERMAN, 394 A.2d 553,
CAN BE FOUND IN THE SEPARATE APPENDIX VOLUME.

APPENDIX

APPENDIX

(Unpublished opinion; affirmed 364 F.2d 828)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 2006

OTTIS MAYO JONES,
Plaintiff

vs.

WILSON WARLICK,
GORDON S. CARR
ARTHUR GOODMAN, JR.,
Defendants

ORDER GRANTING SUMMARY JUDGMENT
[Affirmed 364 F.2d 828]

The plaintiff, Ottis Mayo Jones, has filed with this court what he styles a "Petition for Declaratory Judgment"[1] seeking to recover $200,000.00 in damages from the three defendants—United States District Judge Wilson Warlick, FBI Agent Gordon S. Carr, and Attorney Arthur Goodman, Jr.—

[1] Jurisdiction is based upon the diversity of the citizenship of the litigants and the existence of the requisite amount in controversy.

whom he professes to sue as individuals and not as officers or agents of the United States. The gist of Jones' complaint is that the defendants "knowingly and willfully conspired to deprive this Petitioner [of] his Constitutional rights to a fair trial, to Counsel of his choice and to the immunity guaranteed by the Constitution of the United States . . .," with the result that he was "railroaded" into the federal penitentiary at Atlanta, Georgia, where he is presently serving a sentence of seven years for violating 18 U.S.C.A. §2312. In due course counsel for the defendants filed a motion (accompanied by supporting affidavits) requesting that the complaint be dismissed under Rule 12(b) of the Federal Rules of Civil Procedure because it failed to state a claim upon which relief could be granted, or, in the alternative, that summary judgment under Rule 56 be entered in the defendants' favor. After a careful consideration of the relevant authorities, particularly those cited by the plaintiff, it is the opinion of this court that the motion for summary judgment should be granted.

Despite the plaintiff's insistence that he is suing them as individuals, the fact remains that two of these defendants are United States governmental officials and the third defendant was acting as an officer of a federal court when he (at the request of the court) represented Jones on the criminal charges which had been brought against him. It is settled law that federal public officials are not subject to civil suit for acts performed by them in the course of their official duties. *Barr v. Matteo*, 360

U.S. 564, 569-76[2] (1959); *Howard v. Lyons*, 360 U.S. 593, 597-98 (1959); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872); *Holmes v. Eddy*, 341 F.2d 477, 479-80 (4 Cir. 1965); *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, 658-59 (2 Cir. 1962), *cert. denied*, 374 U.S. 827 (1963); *Gregoire v. Biddle*, 177 F.2d 579, 580-81 (2 Cir. 1949), *cert. denied*, 339 U.S. 949 (1950); *Jones v. Kennedy*, 121 F.2d 40, 42 (D.C. Cir.), *cert. denied*, 314 U.S. 665 (1941); *Cooper v. O'Connor*, 99 F.2d 135, 138 (D.C. Cir.), *cert. denied*, 305 U.S. 643 (1938); *Yaselli v. Goff*, 12 F.2d 396 (2 Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 833-38 (1957). In the *Bradley* case, the civil action for damages was against a judge of a court in the District of Columbia, and in *Yaselli*, the defendant was a Special Assistant to the Attorney General, a position somewhat analogous to that of defendant Goodman in the instant proceeding.[3] Citing the *Yaselli* case in his opinion for the majority in *Barr v. Matteo*, supra, Mr. Justice Harlan expressly stated that the immunity which judges enjoy "extends to other officers of government whose duties are *related to the judicial process.*" 360 U.S. at 569. (Emphasis added.)

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[2] These pages in the *Barr* opinion contain a statement of the rationale of the immunity doctrine.

[3] Both Goff and Goodman were appointed for the limited purpose of participating in specified judicial proceedings.

The duties of all three of the present defendants, clearly insofar as Jones was concerned, were related to the judicial process.

Given the settled rule of law, only if the allegedly wrongful actions were manifestly and palpably beyond the scope of the defendants' authority as federal officials could the plaintiff prevail. It is not enough to contend, as Jones has done in this case, that since they are not authorized to commit wrongful acts, a complaint charging federal officials with having engaged in improper conduct makes the immunity doctrine inapplicable. A similar contention was presented to the Second Circuit in *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655 (1962), *cert. denied*, 374 U.S. 827 (1963). The plaintiff there was complaining about certain allegedly false reports made by officials of the General Services Administration about the manner in which he had performed a construction contract for the Government. Anticipating the immunity defense, the plaintiff asserted that it did not apply because the Government could not authorize the tortious behavior which had allegedly occurred and the defendants "did not have the authority to act to injure and damage" him. The court, after declaring that the plaintiff's construction would defeat the whole immunity doctrine, stated that "what is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act . . . ." 299 F.2d at 659, quoting from Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177

F.2d 579, 581 (2 Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). This same thought was expressed in slightly different words in *Barr v. Matteo*, 360 U.S. 564, 575 (1959), where the Supreme Court said that "the fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable. . . ." Likewise, the Fifth Circuit in *Norton v. McShane*, 332 F.2d 855 (1964), *cert. denied*, 380 U.S. 981 (1965), in discussing the "scope of authority" required for immunity to attach, said that all that is necessary is that the act complained of "have more or less connection with the general matters committed by law to the officer's control or supervision. . . ." 332 F.2d at 859, quoting from *Spalding v. Vilas*, 161 U.S. 483, 498 (1896). Every act about which Jones complains (either in the complaint or in any of the other documents appearing in the record) was at least colorably within the scope of the defendants' authority, as that phrase has been defined by the decided cases.

Jones also claims to be suing under 42 U.S.C.A. §1983 to redress the deprivation of due process which he alleges he suffered as the result of the actions of the three defendants. In support of this claim, he cites the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961), on several occasions and quotes extensively from it. However, his reliance upon section 1983 and the decisions interpreting it is misplaced, for that statutory provision has been held applicable only to persons who, acting under color of a *state or territorial law*,

deprive citizens of rights secured to them by the Constitution and laws of the United States. *Wheeldin v. Wheeler*, 373 U.S. 647, 650 n.2 (1963); *Norton v. McShane*, supra at 862. The conduct of the present defendants was pursuant to *federal*, not state, authority.[4]

There being no genuine issue as to any material fact and it appearing that given the allegations in the plaintiff's complaint, the defendants are entitled to a judgment as a matter of law, the motion for summary judgment is granted.[5]

(s) J. Spencer Bell
Presiding Judge

August 24th, 1965

[4] In all his many extensive documents, the plaintiff refers to only one state statute, the North Carolina attachment statute, by which he contends that he was robbed of his money and other defense evidence. Certain money which the plaintiff had on his person and in a local bank account at the time he was arrested by defendant Carr was subsequently legally attached by *parties other than the present defendants*, and the proceeds in question were placed in the custody of the Clerk of the Mecklenburg County Superior Court for disposition pursuant to law. Furthermore, Jones' "robbery" claim has already been heard and rejected by this court (Judge Warlick presiding) at a pretrial hearing on a motion to suppress certain evidence and by the Fourth Circuit on Jones' direct appeal, *United States v. Jones*, 340 F.2d 599, 601 (1965), and it thus does not merit further judicial consideration.

[5] The plaintiff currently has pending some eight motions in this case. In view of his lack of success on the merits, the several motions are hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI,

Petitioner,

v.

DANIEL ACKERMAN,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: *Page*

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Westmoreland County Court of Common Pleas (A. 41-45) is unreported. The per curiam affirmance order of the Pennsylvania Superior Court (A. 46) is not yet reported in the official reports but appears in the unofficial reports at 384 A.2d 995 (1978). The opinion of the Pennsylvania Supreme Court (A. 48-57) is not yet reported in the official reports but appears in the unofficial reports at 394 A.2d 553 (1978).

JURISDICTION

The final judgment of the Pennsylvania Supreme Court sustaining respondent's assertion of an absolute immunity by virtue of commission held or authority exercised under the United States, and affirming the dismissal of petitioner's complaint, was entered on November 18, 1978. A Petition for Certiorari was filed on January 2, 1979, and certiorari was granted on February 21, 1979. The jurisdiction of this Court to review this case by writ of certiorari is conferred by 28 U.S.C. §1257(3).

STATUTES INVOLVED

Rule 44 of the Federal Rules of Criminal procedure provides in pertinent part:

a. Right to Assigned Counsel. Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings. . . .

b. Assignment Procedure. The procedures for implementing the right set out in subdivision (a) shall be those provided by law and by local rules of court established pursuant thereto.

The Criminal Justice Act of 1964, Pub.L.No. 88-455, §2, 78 Stat. 552 (18 U.S.C. §3006A), as amended, is set forth in pertinent part in Appendix A.

The Criminal Justice Act Plan for the United States District Court for the Western District of Pennsylvania, adopted pursuant to the direction of 18 U.S.C. §3006A(a), also is set forth in pertinent part in Appendix A.

QUESTION PRESENTED

Whether a private attorney, appointed under the Criminal Justice Act (18 U.S.C. §3006A) as defense counsel in a federal criminal prosecution, whose neglect directly results in defendant's conviction and sentencing on three counts on which the statute of limitations had run, enjoys an absolute federal common-law immunity from a common-law action brought by his former client in a state court.

STATEMENT

On August 28, 1974, an indictment was filed against Francis Rick Ferri, the petitioner herein, in the United States District Court for the Western District of Pennsylvania (Appendix B).[1] Among the charges contained in the multi-count indictment were three allegations of Internal Revenue Code firearms violations for which the three-year statute of

[1]Instead of attaching a copy of the indictment and sentencing order to his complaint in the subsequent malpractice action, Ferri, unfamiliar with the rules of judicial notice, merely directed the state trial court to "[t]he complete record(s) of Criminal [sic] Number 74-277, U.S.D. Court, for the Western District of Pennsylvania, which is Plaintiff [sic] issue of negligence herein" (A. 10). Petitioner now asks that this Court as well judicially notice these public documents. *See Massachusetts v. Westcott*,431 U.S. 322, 323 n.2 (1977) and the cases cited therein. For the convenience of the Court, and with the approval and consent of counsel for respondent, copies of the indictment and the docket sheet reflecting the sentence imposed are affixed to this brief as Appendix B.

limitations had run (A. 31).[2]

In December, 1974, Ferri appeared in the federal district court, without counsel, to answer the indictment (A. 7). Pursuant to the mandate, and in accordance with the procedures, of the Criminal Justice Act of 1964 and the local rules promulgated thereunder, the trial judge appointed respondent Daniel Ackerman, a member of the Pennsylvania Bar, to represent the defendant at trial (A. 7,8,26). At no time during the pretrial proceedings, the course of the trial or thereafter did Ackerman assert a statute of limitations defense on Ferri's behalf (A. 31). Accordingly, the guilty verdicts returned by the jury on March 6, 1975, included the three Internal Revenue Code violations as well as a conspiracy (18 U.S.C. §371) to commit and the completion of a substantive offense under 18 U.S.C. §844(i) (A. 9,34;

[2]Because of the posture of the case—plaintiff's action was dismissed pursuant to defendant Ackerman's demurrer—this Court is bound, of course, to accept the allegations contained in Ferri's pleadings as true and to construe them in the light most favorable to him. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45 (1957). Petitioner nonetheless invites the Court's attention to the record herein as proof of the substantiality of his contentions. Counts Seven, Eight and Nine of the Indictment charge violations of the various subdivisions of 26 U.S.C. § §5861 and 5871 (A.34; Appendix B). The isolated incident claimed by the Government as the basis for these charges allegedly took place in its entirety on August 26, 1971 (Appendix B). Despite the unambiguous applicability of a three-year statute of limitations for such Internal Revenue Code offenses, *see* 26 U.S.C. §6531, the indictment was not filed until Wednesday, August 28, 1974 (Appendix B).

Because Counts One and Two charge violations of the Criminal Code, they are subject only to a five-year statute of limitations, 18 U.S.C. §3282, and prosecution thereunder was not time barred. Counts Three, Four, Five and Six do not name Ferri.

The complaint, as amended, therefore, only charges Ackerman with malpractice in connection with Counts Seven through Nine.

Appendix B). A ten-year sentence was imposed on each of the Internal Revenue Code counts to run concurrent with each other but consecutive to the maximum twenty-year sentence imposed on the §844(i) substantive count (Appendix B).[3] The conspiracy charge drew a five-year sentence to run concurrently with the twenty-year sentence.

Shortly after the conviction, Ackerman ceased his representation of Ferri (A. 9),[4] and new counsel pursued an appeal to the United States Court of Appeals for the Third Circuit. Apparently during the course of his examination of the record, appellate counsel discovered the statute of limitations bar to the counts under the Internal Revenue Code. On appeal, therefore, counsel contended that the convictions thereunder were invalid (A. 38-39).

While that appeal was pending, Ferri commenced the instant action *pro se* in the Pennsylvania Court of Common Pleas in Union County (A. 25). The complaint, filed March 4, 1976, was styled "A Complaint in Negligence" and contained sixty-eight allegations of Ackerman's ineffective representation (A. 6-22). Defendant Ackerman responded with a series of preliminary objections including a motion for change of venue (A. 24-27). Most important,

[3]It is this ten-year differential which is alleged to be attributable to defendant Ackerman. In a contemporaneously filed malpractice action against prior counsel, Ferri charges that files lost by that attorney, Dominick Rossetti, contained governmental promises of immunity from the subsequent indictment and conviction under §844(i). A petition for certiorari in that action, *Ferri v. Rossetti*, 78-6153, is currently pending before this Court [reported below at 396 A.2d 1193 (1979)].

[4]The relationship between Ferri and Ackerman was never a good one. During the course of the trial, Ferri complained continuously about the quality of counsel in memoranda, letters and petitions to the district judge. (A. 9).

defendant sought dismissal of the complaint for its failure to state a cause of action, asserting that, by virtue of his appointment under the Criminal Justice Act, "defendant was and is immune from any civil liability, or from any other liability arising from his conduct of the defense of Francis Ferri" (A. 26).

The motion for venue change was granted and the action was transferred to Westmoreland County. By the time of the transfer, however, plaintiff had twice amended his complaint. The first amendment, filed April 2, 1976, supplemented the claim of negligence with two additional common-law claims, one sounding in malpractice and one, relying on a "third party beneficiary theory," alleging breach of contract (A. 28). The second amendment, filed August 18, 1976, simply "reserve[d] the right to amend the original complaint as factual data surface regarding the Defendant's actions in the complained of Criminal Proceedings" (R.- "Plaintiff's Amended Complaint and Petition to Proceed with a Jury Trial"). Such "data" were not long in surfacing.

On October 15, 1976, the United States Court of Appeals affirmed Ferri's conviction by order. *Ferri v. United States,* 546 F.2d 416 (3d Cir. 1976).[5] The unpublished judgment order (A. 38-40) rejected Ferri's eight allegations of reversible error virtually without comment. On each ground, however, the court included a footnote containing citations of authority for its disposition of the claim (A. 39). The footnote following the rejection of the statute of limitations claim cited

[5]The unpublished order is stamped "Filed November 3, 1976". The substance of the order, however, was known to petitioner in mid-October as evidenced by his "traversal" brief (A. 30-33). Furthermore, the report of the order in the Federal Reporter lists the filing date as October 15. Petitioner knows of no reason for this discrepancy.

three federal circuit court decisions. Each of these cases held that a statute of limitations defense will be deemed to have been forfeited if not raised before or during the trial (A. 39). *See United States v. Askins,* 251 F.2d 909, 913 (D.C. Cir. 1958); *United States v. Waldin,* 253 F.2d 551, 558-559 (3d Cir. 1958); *United States v. Kenner,* 354 F.2d 780, 785 (2d Cir. 1965), *cert. denied,* 383 U.S. 958 (1966). In addition, the footnote quoted from *Biddinger v. Commissioner of Police,* 245 U.S. 128, 135 (1917), in which this Court held that "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant. . . ."

Within three days of the affirmance by the Third Circuit, Ferri filed a document which he termed a "Traversal Brief of Plaintiff". Although Ackerman was later to argue to the Pennsylvania Supreme Court that the contents of this document were not properly regarded as an amended pleading, the supreme court, in its opinion, rejected this contention: "In view of the fact that these pleadings were filed without the benefit of counsel, and the question was clearly raised in the court below, we decline to dispose of the issue based upon this procedural irregularity." (A. 49 n.1).

In this "traversal", Ferri raised for the first time the issue which had just come to his attention — the waiver of the statute of limitations by counsel's failure to raise it during the course of the trial. (A. 31 n.1). The "traversal" also dispensed with the earlier sixty-eight allegations of ineffective representation and stated plaintiff's intent to confine his complaint to this "specific failure of the defendant" (A. 30). While alleging a deprivation of his constitutional rights under several of the Amendments to the United States Constitution [including the Fifth, Sixth[6] and Equal Pro-

[6]Ferri's contention was that Ackerman's failure to invoke the statute of limitations satisfied the standard of the "mockery, sham and farce" test. (A. 33).

tection Clause of the Fourteenth], Ferri continued to rely exclusively on state common law — malpractice and negligence — as providing the remedy for such unconstitutional conduct (A. 31,33).[7] Attached as exhibits to the "traversal" were portions of the briefs before the Third Circuit.

On January 31, 1977, the Westmoreland County Court of Common Pleas, sitting *en banc,* sustained defendant Ackerman's claim of absolute immunity and, accordingly, dismissed plaintiff's complaint (A. 41-45). After an order without opinion by the Pennsylvania Superior Court (A. 46), the Pennsylvania Supreme Court granted permission to appeal. Both Ferri, who had continued to proceed *pro se,* and counsel for Ackerman submitted their briefs without oral argument on September 26, 1978, and the supreme court handed down its decision on November 18, 1978.

Writing for four members of the court, Justice Nix treated the case as raising only a federal question. Citing *Howard v. Lyons,* 360 U.S. 593 (1959), he noted:

> "Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope" (A. 49).[8]

Identifying federal law as the source of the answer to the immunity question, the majority directed its attention to a

[7] In the "traversal", Ferri also noted that no petition for a writ of habeas corpus pursuant to 28 U.S.C. §2255 had yet been filed. (A. 32).

[8] Indeed, true to its view of the case as raising solely a federal question, the majority's opinion neither cites nor refers to any Pennsylvania decision or state common-law doctrine. It should be noted that this decision does not involve an incorporation of federal law into state law. Justice Nix's decision makes clear that the court believed resort to federal law was "required". (A. 49).

series of United States Supreme Court decisions establishing the absolute immunity of judges for all acts allegedly performed within the scope of their official duties (A.50-53). The prudential concerns which prompted such an immunity were, as the Pennsylvania Supreme Court saw it, not limited to judges. Noting that "[t]he common law also recognized a need to extend this protection to other participants in judicial proceedings," the majority referred to the extension of absolute immunity to prosecutors by the United States Supreme Court [*see Imbler v. Pachtman,* 424 U.S. 409 (1976)], and to federal defense counsel by two summary decisions of the United States Courts of Appeals [*see Sullens v. Carroll,* 446 F.2d 1392 (5th Cir. 1971); *Jones v. Warlick,* 364 F.2d 828 (4th Cir. 1966) (*per curiam*)] (A. 52-54).To support this broad brush grouping of judges, prosecutors and defense counsel, the court concluded its opinion with a quotation from *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2913 (1978):

> "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."

The four man majority in the Pennsylvania Supreme Court was joined by a fifth who concurred in the result without explanation (A. 55). Justice Roberts filed a dissent on behalf of two members of the court arguing that (i) appointed counsel need no more discretion or freedom than do privately-retained counsel; (ii) defense counsel appointed under the Criminal Justice Act do not act under color of federal law; and (iii) serious equal protection problems would be posed by the disparate treatment of retained and appointed counsel (A. 56-57).

On January 2, 1979, Ferri filed a petition for a writ of certiorari *pro se.* On February 21, the petition was granted and on March 26, counsel for Ferri was appointed by this Court. This is the first time in the course of this litigation that plaintiff-petitioner has had the benefit of counsel.

SUMMARY OF ARGUMENT

I

In *Howard v. Lyons,* 360 U.S. 593 (1959), this Court concluded that, in a state common-law action, the immunity of "officers of the Federal Government" is a question to be judged by federal standards. The Pennsylvania Supreme Court erroneously believed itself constrained by *Howard* to decide the immunity of a private attorney, appointed under the Criminal Justice Act, by resort to applicable federal standards. Counsel appointed under the Act do not, simply by virtue of federal compensation, become officers of the federal government. The legislative history reveals a congressional desire to compensate, not to federalize, the provision of legal assistance for indigents. Indeed, the deletion in the original Act of provisions for a federal defender was explicitly attributed to a desire to ensure the independence of criminal defense counsel. As explained in the House Report to the 1970 Amendments, "[t]he provision was deleted due to doubts raised. . . about the propriety of placing the defense of criminal suspects in the control of the Government since the Government [is] also responsible for prosecutions." H.R. Rep. No. 1546, 91st Cong., 2d Sess. (1970). The private bar segment of the Criminal Justice

Act, on the other hand, has always been viewed as independent of any governmental control. This has prompted the various United States Courts of Appeals to conclude with unamimity that appointed counsel are neither federal "employees" for purposes of the Federal Tort Claims Act nor actors "under color of law" for suits brought directly under the Constitution. In a similar vein, the view that a state-appointed counsel acts "under color of law" within the meaning of 42 U.S.C. §1983 has been uniformly rejected. The common theme of these decisions has been a view of court-appointed counsel as no less private by virtue of government compensation than their retained counterparts.

The present litigation is purely between private parties and does not touch the rights and duties of the United States. Likewise, it will have no direct effect upon the United States Treasury. As this Court recently recognized in *Miree v. DeKalb County,* 433 U.S. 25 (1977), the government's interest in such state common-law actions is far too speculative and far too remote to justify the application of federal common law. The issue whether to displace state law on a matter such as this is primarily a decision for Congress. Congress has taken no such action here. Quite to the contrary, despite the acknowledged existence of a common-law history of malpractice actions against lawyers by dissatisfied clients, not a single congressman urged immunity for appointed counsel.

II

The Pennsylvania Supreme Court compounded its erroneous decision to focus on federal standards by misconstruing what those standards are. Federal officials who

seek absolute exemption from personal liability must bear the burden of showing that public policy requires an exemption of that scope. This Court has, in recent years, accorded absolute common-law immunity to only two classes of government officials: those performing an adjudicatory role, and those performing a prosecutorial role. The decision below extended absolute immunity to court-appointed counsel solely by virtue of his participation in judicial proceedings. This type of approach, focusing on the location of the officer rather than on the characteristics of his duties, has been criticized by this Court on more than one occasion as "overly simplistic." *Imbler v. Pachtman,* 424 U.S. 409, 421 (1976). As *Imbler* indicates, the immunity of a federal officer must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 424 U.S. at 421. There is simply no history of common-law immunity for appointed counsel. In part, this is due to the recent vintage of the recognition of the government's obligation to provide counsel for the indigent defendants. Yet as this Court has often recognized, the paucity of common-law history may be remedied by analogizing the functions of the "new office" to those of an office existing at common law. The issue for resolution, therefore, narrows to whether the functions of appointed counsel more closely parallel those of judges and prosecutors - traditionally accorded immunity at common law - or those of private counsel who enjoyed no such immunity. Merely to pose the question is to suggest the answer. Counsel appointed under the Criminal Justice Act owes his primary obligation to the defendant and not to the court or the public at large. His duties, burdens and responsibilities are exactly the same as those of private, retained counsel. The Act's purpose was to create a system

of compensated appointed counsel, independent of government control and free to perform their functions in as nearly as possible the same manner as if privately retained. Congress did not thereby create a new function, it merely made available an already existing one to those without financial means.

Immunity is not granted for the benefit of the erring official. It is, instead, intended solely for the benefit of the public interest. Absolute immunity is afforded judges and prosecutors in order to insure that their loyalties are not divided between the imposed duty to the public and the natural instinct to protect oneself from suit. The key concern in these decisions has been the tension or conflict that exists between the public need and the fear of suit. An appointed counsel, on the other hand, is not a servant of the public. His duty is undivided. He serves only the client for whose representation he has been appointed. It is difficult to see, therefore, how potential liability for failing to provide a competent defense divides a lawyer's loyalties between himself and the person he is supposed to defend. Quite to the contrary, it is the grant of immunity which would raise the spectre of divided loyalties. At the very same time that he is representing the indigent pursuant to his appointment, the appointee is maintaining a private practice. The private practice, of course, is potentially a source of a common-law malpractice action. There has always been the concern that the busy lawyer who receives an appointment will render a perfunctory service at best. How much more serious is this concern, however, where only the paying portion of his practice may subject the attorney to malpractice liability. It calls for little speculation to predict that a lawyer, hard pressed for time, will be likely to devote an inappropriate percentage of his energies to the portion of his practice which

carries with it the possibility of liability for substandard work. The professional duty to the indigent is here at odds with the natural instinct to protect oneself from suit. Ironically, therefore, the very tension which the grant of immunity to judges and prosecutors was adopted to alleviate would instead be promoted by a similar grant of immunity to a court-appointed counsel.

III

American common law has never accorded immunity to retained criminal defense counsel. The creation and application of a different rule for those paid to represent indigent criminal defendants would result in the denial, solely on the basis of poverty, of two inherently fundamental rights: the right to the effective assistance of counsel and the right of access to the courts. The first of these is prophylactic. The second is compensatory.

Too many important constitutional rights may be lost by the actions of one's attorney to demand anything but an uncompromising, competent lawyer with undivided loyalty to his client. A counsel without accountability poses far greater dangers of ineffectiveness. It is just such a concern which prompted D.R.6-102 of the ABA Code of Professional Responsibility [prohibiting a lawyer from entering into contractual relationships "to exonerate himself from or limit his liability to his client for his personal malpractice"]. A lawyer who handles the affairs of his clients properly has no need to limit his liability. The lawyer who fails to afford the appropriate standard of service, on the other hand, should not be permitted to escape accountability. ABA *Code of Professional Responsibility* E.C. 6-6. Counsel for indigents

generally need an extra push to ensure that they pursue their client's interests as zealously as would retained counsel. To fail to provide even the *same* push that is experienced by retained counsel contravenes the requirements of equal protection. The grant of absolute immunity would establish a lower standard of care for the poor man's lawyer.

There is, of course, no constitutional right to sue for malpractice. Once such an action has been accorded by statute or common law, however, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). Absolute immunity deprives an indigent of the only effective means of recovering for liberty lost by virtue of incompetent counsel. In contrast, the person with means to retain counsel is permitted free access to the courts for the identical injury. Assuredly, such classification requires some assertion of a compelling or at least significant governmental reason. Yet not even a rational basis justifying the distinction appears evident. All of the arguments that have been pressed for the grant of absolute immunity apply with equal force to retained counsel. When the articulated justifications are swept aside as facade, all that remains is a fear that the indigent will be more litigious and more likely to press frivolous claims. Our Constitution prohibits such invidious generalizations and this Court ought not allow them to serve as the basis for a discriminatory common-law doctrine of immunity.

ARGUMENT

I.

THE QUESTION OF WHETHER A PRIVATE ATTORNEY, APPOINTED TO REPRESENT AN INDIGENT DEFENDANT UNDER THE CRIMINAL JUSTICE ACT, MAY BE SUED FOR COMMON-LAW MALPRACTICE DOES NOT REQUIRE DECISION UNDER FEDERAL COMMON LAW.

In *Howard v. Lyons,* 360 U.S. 593 (1959), this Court held that, in a state defamation action, the immunity of "officers of the Federal Government, acting in the course of their duties" is a question to be judged by "federal standards" formulated by the courts. *Id.* at 597. *See also Butz v. Economou,* 438 U.S. ____, 98 S.Ct. 2894, 2911 n. 34 (1978) ["federal officials" sued for traditional remedies at state law for alleged transgressions should be entitled to a qualified federal common-law immunity]. The Pennsylvania Supreme Court believed itself constrained by *Howard* to decide the immunity of court-appointed counsel in federal criminal proceedings by resort to applicable federal standards.[9] While it subsequently misconstrued what those standards are, *see* Point II, *infra,* its threshold error was in focusing on federal common-law standards at all. Counsel appointed under the Criminal Justice Act do not, by virtue of

[9]The question of what immunity a court-appointed counsel might enjoy under state law was not addressed by the court. Indeed, the Pennsylvania Supreme Court seems never to have passed on the question of the immunity of state court-appointed counsel from similar malpractice actions.

the federal compensation received, become "officers" of the federal government. Federally-imposed immunity has no more place in defining the scope of a court-appointed counsel's immunity from state common-law malpractice and tort actions commenced in a state court than it would in a similar action against retained counsel. Where, as here, we deal neither with "the authority of a federal officer" nor with the "functioning of the Federal Government", *Howard*'s mandate to look to federal common law is simply inapplicable. Since the litigation is between private parties and no substantial rights or duties of the United States hinge on its outcome the question of immunity does not require decision under federal common law. *Miree v. DeKalb County,* 433 U.S. 25 (1977). The issue of whether to displace state law on an issue such as this is primarily a decision for Congress. *Id.* at 32. Congress has chosen not to do so in this case.[10]

A. Both the Legislative History and Operational Structure of the Criminal Justice Act Manifest an Intent to Keep Appointed Counsel Independent of any Association with or Control by the Federal Government.

At least since *Johnson v. Zerbst,* 304 U.S. 458 (1938), it has been clear that the Sixth Amendment requires appointment of counsel in federal criminal prosecutions. *See also Gideon v. Wainwright,* 372 U.S. 335, 348 (1963) (Clark, J., concurring). Prior to the enactment of the Criminal Justice

[10]That the state court's reliance on federal law was inappropriate does not, of course, deprive this Court of jurisdiction where, as here, a federal immunity was "specially set up or claimed" under a statute, "or commission held or authority exercised under, the United States." 28 U.S.C. §1257(3).

Act of 1964, Pub.L.No. 88-455, §2, 78 Stat. 552 (codified at 18 U.S.C. §3006A(1976)), the federal system, however, failed to compensate assigned counsel. This lack of financing resulted in lawyers disposing of their assignments with inappropriate dispatch and insufficient investigation. Report of the Special Committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association, *Equal Justice for the Accused* 67 (1959). It was to remedy this situation that the Criminal Justice Act was enacted. That the Act was designed primarily to compensate and not to federalize the provision of legal assistance in federal criminal prosecutions is amply evinced by the legislative history.

The original bill passed by the Senate in 1963 had included a provision authorizing a federal public defender system as well as a system for compensating private appointed counsel. The House removed the public defender provision and the conference committee resolved differences in favor of the House position. As explained in the House Report to the 1970 Amendments, "[t]he provision was deleted due to doubts raised in the House about the propriety of placing the defense of criminal suspects in the control of the Government since the Government was also responsible for prosecutions." H.R. Rep. No. 1546, 91st Cong., 2d Sess. *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3982, 3984. The 1964 House debates bear this out. Congressman Arch A. Moore, Jr., the author of the bill that emerged from the conference committee and became the Act, decried the Senate version of the bill for its attempted establishment of a federal defender office and noted:

> "This would have had the effect of placing the administration of justice totally in the hands of the Federal Government. An individual, accused of a crime, would have been tried before a Federal judge, prosecuted by a Federal district attorney, and defended by a Federal public defender. Thus, the total right to a fair trial and to the preservation of one's right to liberty would be solely dependent upon men appointed by the Federal Government and compensated out of the Federal Treasury." 110 CONG. REC. 18558 (August 7, 1964).

Similar concerns were voiced by several of the major proponents of the House version. *See, e.g.*, the remarks of Congressman Willis ("this sort of system is contrary to our time-honored system of checks and balances"), 110 CONG. REC. 448 (January 15, 1964); Congressman Moore ("totally inconsistent with even-handed justice, democratic society, and good common sense"), 110 CONG. REC. 445 (January 15, 1964); and Congressman McCulloch ("Most fearful, however, is that clear and present danger that would exist to our basic liberties if a Federal public defender system was established"), 110 CONG. REC. 455 (January 15, 1964).

Although the 1970 Amendments to the Criminal Justice Act, Pub.L.No. 91-477, §1, 84 Stat. 916, eventually did create a federal public defender system, the concern about its lack of independence from the federal government continued. In the study (commissioned in 1967 by the Judicial Conference of the United States in conjunction with the Department of Justice) which served as the foundation for the 1970 Amendments, Professor Dallin H. Oaks of the University of Chicago Law School noted the comparative advantages and disadvantages of the private appointed counsel and public defender systems. Among the major disadvantages of the latter, he listed the inability of the federal defender to be "as vigorously independent" as appointed counsel. *Hearings before the Subcomm. on*

Constitutional Rights of the Senate Judiciary Comm. on S. 1461, 91st Cong., 1st Sess., 305-306 (1969). In partial recognition of this concern, the 1970 Amendments to the Criminal Justice Act adopted a "mixed system" which continued participation by the private bar in the defense of indigents in federal criminal prosecutions while at the same time establishing federal defender organizations. As noted in the House Report: "S. 1461 is expressly tailored to meet earlier objections to the concept of a Federal public defender system by making active and substantial participation by private attorneys basic to any district plan for representation. The use of appointed private counsel can be supplemented but not replaced." H.R. Rep. No. 1546, 91st Cong., 1st Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 3982, 3985.

The independence of the private bar segment of the Criminal Jusice Act is more than merely theoretical. The entire operational structure of §3006A is one of non-supervision. Although paid with funds from the United States Treasury, when appointed by the courts to represent a defendant, counsel "function[s] independently of any agency of the Government and in a truly adversary action." *United States v. Robinson,* 553 F.2d 429, 430 (5th Cir. 1977), *cert. denied,* 434 U.S. 1016 (1978).

Under the Internal Operating Procedures of the Western District of Pennsylvania Criminal Justice Act Plan, an attorney who desires to be listed on the panel applies to the Federal Public Defender who evaluates his background and qualifications and then makes a recommendation to the court (A. 36). When a person who is financially eligible appears before the district court charged with a felony or misdemeanor, counsel will be appointed for him (Section III A(1) of Western District Plan set forth in Appendix A).

Where counsel has previously undertaken to represent the defendant, whether at defendant's request or otherwise, prior to his presentation before a judicial officer, such counsel may seek appointment and compensation from the court. If such counsel appears on the approved panel, compensation may be made retroactive to cover time expended during the arrest period (Section III B(1)). It nonetheless remains true that defendant does not have the right to select his appointed counsel from the list of attorneys (Section V A(3)). The Western District's "mixed plan" provides for "private attorney appointments" in at least twenty-five percent of all cases involving eligible indigent defendants (Section V B). These aptly-named "private attorney appointments" have no continuing employment arrangement with the government, are not furnished with an office or secretarial support, maintain a concurrent and unlimited private, retained practice and do not appear to the client as a person cloaked with the authority of the state. *See* Oaks Report, *Hearings on S. 1461, supra,* at 306, for the difference in client perceptions of appointed counsel and public defenders.[11]

[11]It is interesting to note that the 1977 Annual Report of the Director of the Administrative Office of the United States Courts, in its listing of "Personnel in the U.S. Judiciary", lists public defenders but make no mention of private appointed counsel. Report at 27 (Table XI). Thus, it is clear that the client is not alone in perceiving the two categories as having distinctly different relationships with the federal government.

B. The United States Courts of Appeals Have Been Unanimous in Concluding That Neither Federal nor State Court-Appointed Counsel are Government Officers, Government Employees or Act Under Color of Governmental Authority.

The precise issue presented here — whether a court-appointed counsel in a federal prosecution sued in a state court for common-law malpractice or tort is to be deemed a federal official for the purpose of cloaking him with federal immunity — has never before been addressed by any appellate court. *But see Sullens v. Carroll,* 446 F.2d 1392 (5th Cir. 1971) [*see* fn. 14, *infra*]. A number of analogous situations, however, point to a negative answer to this query.

The Federal Tort Claims Act, 28 U.S.C. §1346(b), permits suit for negligence against the United States for the conduct of its "employees". In *Jones v. Hadican,* 552 F.2d 249 (8th Cir.), *cert. denied,* 431 U.S. 941 (1977), plaintiff attempted to sue the United States for the legal malpractice of his federally-appointed counsel. Rejecting the notion that a Criminal Justice Act appointment made one an "employee of the United States", the Eighth Circuit affirmed the dismissal of the complaint, noting that "the United States had no right to control [counsel's] representation of [defendant]." 552 F.2d at 251 n. 4. There are no other federal appellate decisions on the issue.

A number of individuals have attempted to sue their federally-appointed counsel directly under the Constitution, invoking a remedy paralleling that recognized in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).[12] Reasoning that a *Bivens*-type suit requires "federal

[12] *Bivens*, of course, limited its specific holding to claims under the Fourth Amendment. Whether similar general constitutional remedies may be implied from the Sixth Amendment's guarantee of the effective assistance of counsel is a question not yet faced by this Court.

action" in the same manner as 42 U.S.C. §1983 requires "state action", the United States Courts of Appeals for the First and Second Circuits (the only ones squarely to face the question) have concluded that Criminal Justice Act appointees are merely "private individuals not acting under color of law". *Housand v. Heiman,* ____ F.2d ____ (2d Cir. March 20, 1979), slip op. at 1827, 1829-1830; *Page v. Sharpe,* 487 F.2d 567 (1st Cir. 1973). In so holding, these courts took their cue from the unanimous conclusions of the various circuits to the effect that state court-appointed counsel do not act under "color of law" within the meaning of §1983. *See, e.g., O'Brien v. Colbath,* 465 F.2d 358, 359 (5th Cir. 1972); *Mulligan v. Schlachter,* 389 F.2d 231, 233 (6th Cir. 1968); *French v. Corrigan,* 432 F.2d 1211, 1214-1215 (7th Cir. 1970), *cert. denied,* 401 U.S. 915 (1971); *Barnes v. Dorsey,* 480 F.2d 1057, 1061 (8th Cir. 1973); *Szijarto v. Legeman,* 466 F.2d 864, 864 (9th Cir. 1972) (*dictum*); *Espinoza v. Rogers,* 470 F.2d 1174 (10th Cir. 1972). *See also Thomas v. Howard,* 455 F.2d 228, 229 (3d Cir. 1972) [volunteer attorney in post-conviction proceeding did not act under color of law]. There are no decisions to the contrary.[13] Indeed, some circuits have even concluded that *public defenders* do not act under color of state law, *see Slavin v. Curry,* 574 F.2d 1256, 1265 (5th Cir. 1978); *Espinoza v. Rogers,* 470 F.2d 1174 (10th Cir. 1972), although this more difficult question has not been resolved

[13] In one reported decision, *Minns v. Paul,* 542 F.2d 899 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977), the Fourth Circuit found it unnecessary to reach the state action question in light of its finding of immunity under §1983. Such an approach is difficult to understand. It seems "obvious that the state action question, a require ment for subject matter jurisdiction, must be weighed prior to a consideration of immunity." *Robinson v. Bergstrom,* 579 F.2d 401, 404 (7th Cir. 1978).

with unanimity. *See Robinson v. Bergstrom,* 579 F.2d 401, 404-408 (7th Cir. 1978). *See also Brown v. Joseph,* 463 F.2d 1046, 1047-1049 (3d Cir. 1972), *cert. denied,* 412 U.S. 950 (1973) [court apparently assumes, without deciding, that public defender does act under color of state law, although it indicates that such color of law would be "difficult" to perceive]; *Miller v. Barilla,* 549 F.2d 648, 650 (9th Cir. 1977) [court notes in dicta that state action claim, as applied to public defender, is "tenuous"]. Even those decisions which find state action in the conduct of defender organizations, however, have been quick to distinguish the situation of appointed counsel. In *Robinson, supra,* 579 F.2d at 405, *quoting French v. Corrigan, supra,* 432 F.2d at 1214, for example, the Seventh Circuit noted that private attorneys appointed to defend indigents " 'were not functionaries of the state but were proceeding in their private capacity'."

In sum, therefore, there is not a single federal decision which has held that mere governmental compensation to private counsel for the representation of indigents in criminal prosecutions invests that individual with color of law or badge of office.[14] This current state of the law conforms in all respects with the vision of the drafters of the original Criminal Justice Act — to compensate rather than federalize the representation of indigents.

[14]Neither *Jones v. Warlick,* 364 F.2d 828 (4th Cir. 1966), nor *Sullens v. Carroll,* 446 F.2d 1392 (5th Cir. 1971), the two summary decisions relied on by the Pennsylvania Supreme Court appears to have considered the question. Both seem to find immunity regardless of the defendant's status as an officer. Indeed, in *Sullens, supra,* the Fifth Circuit concluded that "court-appointed counsel are immune from suit *the same as* federal officials are." (emphasis added). In any event, later decisions in the Fifth Circuit clearly find no color of law involved in the conduct of appointed counsel. *O'Brien v. Colbath,* 465 F.2d 358, 359 (5th Cir. 1972). The Fourth Circuit, on the other hand, believes the question to be still open. *Minns v. Paul,*542 F. 2d 899, 900 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977). *See* fn. 13, *supra.*

C. No Substantial Rights or Duties of the United States Hinge on the Outcome of This State Litigation Between Private Parties.

Underlying the command of *Howard v. Lyons,* 360 U.S. 593 (1959), to look to federal common law when testing the validity of a defense by a federal officer, sued for having committed a state common-law tort in the course of his official duties, is the recognition of the clear and substantial government interest in the efficient operations of its agencies and instrumentalities. Defendant in *Howard* was the Commander of the Boston Naval Yard, sued for alleged defamatory material contained in an official memorandum, copies of which had been mailed to members of the Massachusetts congressional delegation. The defendant's authority to act derived solely from federal sources and the scope of his authority to make privileged statements "in the course of duty" involved a question the resolution of which directly affected "the effective functioning of the Federal Government." It is hardly surprising, therefore, that Mr. Justice Harlan concluded: "[n]o subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States." 360 U.S. at 597.

An entirely different situation is presented by the instant case. There is here no clear and substantial interest of the national government, no significant threat to any identifiable federal policy or interest and no matter essentially of federal character. The Pennsylvania Supreme Court's decision to look to federal law in gauging the scope of Ackerman's defense may be thought to rest on two perceived federal interests: (1) that defendant was a federal actor acting pursuant to federal authority; or (2) that the tortious act

alleged arose during the course of a federal legal proceeding. Neither justification for resort to federal common law in an action based solely on state law withstands analysis.

That the defendant cannot be considered a federal actor has already been demonstrated. He cannot be sued as such under the Constitution, *see Housand v. Heiman*, ____ F.2d ____ (2d Cir. March 20, 1979), slip op. at 1827. The Federal Government is not responsible for his negligence as they would be for that of a federal employee, *see Jones v. Hadican*, 552 F.2d 249, 251 n.4 (8th Cir.), *cert. denied*, 431 U.S. 941 (1977). His state equivalent does not act under "color of law" within the jurisdictional requirements of 42 U.S.C. §1983. *See, e.g., French v. Corrigan*, 432 F.2d 1211, 1214-1215 (7th Cir. 1970), *cert. denied*, 401 U.S. 915 (1971).

To be sure, there are connections between the court-appointed counsel and the government. The court selects him for the panel from the list given it; it appoints him to the specific case; and the Administrative Office pays him for his services. But these are simply not enough. Indeed, one court has perceptively noted that, far from constituting action of the government, the appointed counsel is obligated to "oppose the efforts of the state." *Vance v. Robinson*, 292 F.Supp. 786, 788 (W.D.N.C. 1968). An attorney's allegiance is to his client, not to the person who happens to be paying him for his services. *Spring v. Constantino*, 168 Conn. 299, 362 A.2d 871 (1975). Moreover, payment by the government does not endow the lawyer with any powers not already possessed by virtue of being licensed to practice. Indeed, should he desire to do so without compensation, he could represent the defendant absent any appointment at all. *See* Mallen, *The Court-Appointed Lawyer and Legal Malpractice—Liability or Immunity*, 14 Amer.Crim.L.Rev. 59, 62 (1976). As the Chief Justice noted several years ago, "defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards*, 8 Amer.Crim.Law.Q. 1, 6 (1969). *See also* ABA *Standards Relating to the Defense Function*, Section 3.9 (1971). In short, the status of a Criminal Justice Act appointee is no different, for these purposes, than that of retained counsel. The mere fact that the latter is paid by the individual with means and the former by the Government on behalf of the individual without such means is an inadequate basis for resort to federal standards in a state common-law action. No more than with the private physician paid for his services under Medicaid funds, 42 U.S.C. §1396-1396k, can the mere source of compensation provide the basis for the incursion of federal common law into malpractice litigation surrounding the conferral of private services.

Both the court-appointed counsel and his retained counterpart are, of course, "officers of the court". But, as this Court has pointed out on a number of occasions, the word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers within the conventional meaning of that term. *See, e.g., In re Griffiths*, 413 U.S. 717, 728 (1973). Certainly nothing that has been said "in any . . . case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges." *Cammer v. United States*, 350 U.S. 399, 405 (1956). As Mr. Justice Black noted in *Cammer*, "[u]nlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice." *Id.* They make their own decisions and

follow their own best judgment. In short, "they are not officials of government by virtue of being lawyers." *In re Griffith, supra,* 413 U.S. at 729. The present litigation is simply between private parties.

The Pennsylvania Supreme Court's decision may alternatively be read as requiring resort to federal law, not because of the nature of the defendant, but because of the situs of the tort — in preparation for or in the course of a federal criminal proceeding. Taken on its face, the court's assertion that "we are required to look to the federal law" in determining the immunity of "a participant in a federal legal proceeding" (A. 49) would require application of a federal standard whether the action was commenced against a retained counsel or an appointed one. There is simply no authority for this wide-ranging statement.[15] Where a legal malpractice tort is committed against a citizen of a state, it makes little sense to have the existence of that state's common-law remedy depend upon whether the representation took place in a federal or state forum. If federal common law is to control on the question of immunity, why not as well on the definition of negligence and the measurement of damage?

"The present litigation is purely between private parties and does not touch the rights and duties of the United States." *Bank of America Nat. Trust & Sav. Ass'n v. Parnell,* 352 U.S. 29, 33 (1956). Although funds from the United States Treasury provided defendant Ackerman's compensation, these funds are not placed in jeopardy by the

[15]The instant case, of course, has nothing whatsoever to do with the privilege enjoyed by counsel and witnesses alike against defamation actions for statements made in connection with a judicial proceeding. *See Imbler v. Pachtman,* 424 U.S. 409, 426 n. 23 (1976).

present action. The resolution of petitioner's claim "will have no direct effect upon the United States or its Treasury." *Miree v. DeKalb County,* 433 U.S. 25, 29 (1977). Any interest the federal government may have in the subsequent liability of those whom it compensated, like its interest in the transfer of Government paper in *Parnell,* is far too speculative and far too remote to justify the application of federal law. 352 U.S. at 33-34. The issue whether to displace state law on a matter such as this "is primarily a decision for Congress." *Wallis v. Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966). In the past, when Congress has seen fit to grant immunity, "it has done so by statute". *Martinez v. Schrock,* 430 U.S. 920 (1977) (White, J., dissenting from denial of certiorari). Petitioner does not dispute Congressional power to extend immunity in a manner consistent with the equal protection mandate of the Fifth Amendment. *See* Point II, *supra.* But Congress has taken no such action here. On the question of immunity, no intent to displace state law is evinced.

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law generally to be applied is the law of the State." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Although *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), identifies a limited area for the operation of federal common law in actions commenced under state law, this is not such a case.

The parallel between the instant action and the one at issue in *Miree v. DeKalb County,* 433 U.S. 25 (1977), is striking. *Miree* arose out of the crash of a private Lear Jet shortly after takeoff from the DeKalb-Peachtree Airport. Plaintiffs, primarily the survivors of the deceased passengers, sought to impose liability on DeKalb County as third-party beneficiaries of contracts between the County and the Federal

Aviation Administration. Under the terms of the federal grant agreement, the County had agreed to take certain safety measures. Plaintiffs contended that such measures had not been effectuated and that such failure had resulted in the air crash. Like the present case, therefore, *Miree* was a state common-law action between private parties. Like the present case, the suit concerned an obligation to plaintiffs undertaken in order to receive federal funds. Like the present case, the litigation raised no question regarding the liability or responsibilities of the United States and could, therefore, have "no direct effect upon the United States or its Treasury". 433 U.S. at 29.

The question posed by *Miree* concerned whether plaintiffs as third-party beneficiaries had standing to sue the County. In a 9-0 decision this Court held federal common law inapplicable. In an opinion joined by all but the Chief Justice, Mr. Justice Rehnquist wrote "[s]ince only the rights of private litigants are at issue here, we find the *Clearfield Trust* rationale inapplicable." *Id.* at 30. The same result should prevail here. Certainly the interests of the United States in regulating aircraft travel and promoting air travel safety, on the one hand, and in promoting an efficent method of representation for defendants in federal criminal prosecutions, on the other, are both significant. But neither interest is threatened by purely private litigation in any but the most speculative, remote manner.

Because, therefore, the representation of Ferri in his criminal trial did not constitute government activity, federal interests are not sufficiently implicated to warrant the application of federal common law on the question of immunity. In any event, as shown below, federal common law accords no immunity to one serving as appointed counsel. *See* Point II, *infra.* The line separating these two

propositions is, at times, blurred. Although the first concerns choice of law and the second, interpretation of federal common law, both lead to the same conclusion. Indeed, in his dissent in the Pennsylvania Supreme Court, Justice Roberts combined the two by concluding that, because they do not act under color of law, court-appointed attorneys do not, as a matter of "federal immunity law . . . acquire status as . . . federal official[s] entitled to immunity" (A. 57).

II.

FEDERAL COMMON LAW AFFORDS NO IMMUNITY TO A PRIVATE ATTORNEY WHOSE APPOINTMENT AND COMPENSATION BY THE FEDERAL GOVERNMENT ARE INTENDED SOLELY FOR THE PRESERVATION OF THE CONSTITUTIONAL RIGHTS OF THE CRIMINAL DEFENDANT.

Recent decisions of this Court have accorded absolute common-law immunity from suits alleging unconstitutional conduct to only two classes of government officials: those performing an adjudicatory role, *see Pierson v. Ray,* 386 U.S. 547 (1967) [state court judges]; *Butz v. Economou,* 438 U.S. ____ , 98 S. Ct. 2894, 2912-2915 (1978) [administrative agency hearing examiners],[16] and those performing a prosecutorial role, *see Imbler v. Pachtman,* 424 U.S. 409 (1976) [state prosecutors]; *Butz v. Economou, supra,* at 2915-2916 [administrative agency

[16]The Court has also noted with approval the analogous grant of absolute immunity to grand jurors. *See Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2912-2913 (1978).

officials performing prosecutorial functions — both those who intitiate the administrative proceedings and those who conduct the trial on behalf of the agency]. For no other official has more than a qualified immunity been found warranted. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232 (1974) [state governor; state university president; senior officers of the state national guard]; *Wood v. Strickland,* 420 U.S. 308 (1975) [school board members]; *O'Connor v. Donaldson,* 422 U.S. 563 (1975) [superintendent of state hospital]; *Procunier v. Navarette,* 434 U.S. 555 (1978) [state prison administrators]; *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894 (1978) [Secretary of Agriculture].[17] While these cases usually involve §1983 claims against state officials, this Court has recently evinced a desire for congruity between federal and state officials sued for constitutional infringement of a citizen's rights. *Butz v. Economou, supra,* at 2907-2908.[18] In light of *Butz,* it is now clear that the immunity accorded federal officials may be accurately measured by scrutiny of the prudential considerations outlined in §1983 decisions. *The Supreme Court, 1977 Term,* 92 Harv.L.Rev. 57, 271 (1978); Note, 52 Temp.L.Q. 102, 110-114 (1979).

In his pleading Ferri alleges that, as a consequence of defendant Ackerman's gross neglect and malpractice, he has been deprived of his constitutional rights under the Fifth and Sixth Amendments of the United States Constitution

[17]Although this Court has accorded absolute immunity to persons performing a legislative function, *see, e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* ____ U.S. ____ , 99 S.Ct. 1171 (1979), the applicability of such a doctrine to the present case would be patently inappropriate.

[18]Although plaintiff's complaint in *Butz* contained both claims directly under the Constitution and allegations of common-law torts, 98 S.Ct. at 2899 n. 5, the Court addressed only the former. 98 S.Ct. at 2905 n. 22.

(A. 31).[19] Ackerman's defense relies on an absolute federal common-law immunity. As this Court recognized in *Butz,* "federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." 98 S.Ct. at 2911. Even assuming that Ackerman can convince this Court of the applicability of federal common law to state litigation between private citizens [*See* Point I, *supra*], it is plain that he cannot, under the recent decisions of this Court, carry the burden imposed upon him by *Butz.* Indeed, quite to the contrary, the grant of absolute immunity to Criminal Justice Act attorneys would engender precisely the internal conflicts which the imposition of immunity typically is designed to avoid and would discourage the very same zealous performance of duty that the grant of such immunity seeks to achieve.

A. There is Neither a Common-Law History of Immunity for Private Counsel nor a Legislative Intent to Grant Such by Virtue of Appointment Under the Criminal Justice Act.

The Pennsylvania Supreme Court extended absolute immunity to federal court-appointed counsel solely by virtue of his participation in judicial proceedings (A. 52). This type of approach, focusing on the location of the officer rather than on the characteristics of his duties, has been

[19]Ferri, however, finds his remedy solely in common-law malpractice and tort. He does not seek a remedy directly under the Constitution nor could he, if, as the lower federal courts have concluded, a court-appointed counsel does not, by virtue of his appointment, act "under color of federal law". *Housand v. Heiman,* ____ F. 2d ____ (2nd Cir. March 20, 1979), slip op. at 1827, 1829 n. 1.

criticized by this Court on more than one occasion as "overly simplistic." *Imbler v. Pachtman,* 424 U.S 409, 421 (1976); *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2913 (1978). As *Imbler* indicates, the immunity of a federal officer must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 424 U.S. at 421. The first of these factors is explored below. The second will be dealt with in Point II B, *infra.*

Where this Court has found absolute immunity, it has relied heavily on aged historical foundations. In according such immunity to judges, for example, it has found roots extending back at least four hundred years, *see Floyd v. Barker,* 12 Co.Rep. 23, 77 Eng.Rep. 1305 (K.B. 1608); and given voice by its own decisions for more than one hundred years. *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335 (1872); *Randall v. Brigham,* 74 U.S. (7 Wall.) 523 (1869). Similarly, in recognizing a like immunity for prosecutors, the Court has been able to cite long-standing common-law precedent. *Griffith v. Slinkard,* 146 Ind. 117, 44 N.E. 1001 (1896); *Yaselli v. Goff,* 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927). Even where it has accorded only a qualified immunity, the Court has felt constrained to rely upon ancient common-law origins. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 239-240 n. 4 (1974) [traces immunity of the executive back seven hundred years]; *Butz v. Economou,* 438 U.S. ____ , 98 S.Ct. 2894, 2902 (1978).

There is simply "no history of common-law immunity" for either appointed counsel or public defenders. *Robinson v. Bergstrom,* 579 F.2d 401, 409 (7th Cir. 1978); *Minns v. Paul,* 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977). Quite to the contrary, the recognition by

numerous federal decisions that a defendant "would arguably have the same state action in tort for malpractice against the public defender [or court-appointed counsel] as a former client might have against a retained attorney" implicitly leads to the conclusion that common law accords no such immunity. *See, e.g., Robinson v. Bergstrom, supra,* 579 F.2d at 411; *Tasby v. Peek,* 396 F.Supp. 952, 958 (W.D. Ark. 1975); *Louisiana ex rel. Purkey v. Ciolino,* 393 F.Supp. 102, 105, 110 (E.D. La. 1975); *Sanchez v. Murphy,* 385 F.Supp. 1362, 1364 (D. Nev. 1974); *Hill v. Lewis,* 361 F.Supp. 813, 818 (E.D. Ark. 1973); *United States ex rel. Wood v. Blacker,* 335 F.Supp. 43, 46 (D. N.J. 1971); *Vance v. Robinson,* 292 F.Supp. 786, 788 (W.D.N.C. 1968).[20] *See also Spring v. Constantino,* 168 Conn. 563, 576, 362 A.2d 871, 879 (1975) [holding unanimously that state public defender enjoys no common-law immunity from state malpractice action]; *Housand v. Heiman,* ____ F.2d ____ (2d Cir. March 20, 1979), slip op. 1827, 1832 [dismissing *Bivens*-type action against federally-appointed counsel for absence of "federal action" but remanding claim under diversity jurisdiction]. *Cf. Walker v. Kruse,* 484 F.2d 802, 804 (7th Cir. 1973) [suggesting that Illinois courts might afford a state law immunity from malpractice liability to counsel appointed to serve *without* compensation].

The federal decisions identify a critical reason for the paucity of common-law history - the obligation of the

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[20]Apparently the only decision to find *common-law* immunity for court-appointed counsel from state malpractice actions is *Sullens v. Carroll,* 446F.2d 1392 (5th Cir. 1971). Note, *Minns v. Paul: Section 1983 Liability of State-Supplied Defense Attorneys,* 63 Va.L.Rev. 607, 620 (1977). The court in *Sullens* based its holding not on historical foundations but on an analogy to other "federal officials".

government to provide counsel for the indigent defendant is of recent vintage.[21] *See Robinson v. Bergstrom, supra,* 579 F.2d at 409; *Minns v. Paul, supra,* 542 F.2d at 901. Yet, as this Court has often recognized, the paucity of common-law history may be remedied by analogizing the functions of the "new office" to those of an office existing at common law. *See Wood v. Strickland,* 420 U.S. 308, 318-319 (1975); *Butz v. Economou,* 438 U.S. ____, 98 S.Ct. 2894, 2913-2916 (1975). The issue for resolution, therefore, narrows here to whether the functions of appointed counsel more closely parallel those of judges and prosecutors[22] - traditionally accorded immunity at common law - or those of private counsel who enjoyed no such immunity. Indeed, common law is replete with instances of clients' actions of malpractice, negligence and breach of contract against their attorneys. *See, e.g., Pitt v. Yaldin,* 4 Burr. 2060,98 Eng.Rep. 74 (K.B. 1767) [for representation in civil matter] *Stephens v. White,* 2 Va. 203 (1796) [civil]; *Eccles v. Stephenson,* 6 Ky. 517 (1814) [civil]; *Hatch v. Lewis,* 175 Eng.Rep. 1145 (N.P. 1861) [criminal]; *Malone v. Sherman,* 49 N.Y.Super. 530 (1883) [criminal]; and *Cleveland v. Cromwell,* 110 App. Div. 82, 96 N.Y.S. 475 (1905) [this case is of particular interest since the complaint therein charged criminal defense counsel with failing to note the running of an applicable statute of limitations].

[21]This historical premise may not be entirely accurate. As noted by the American Bar Association Project on Standards for Criminal Justice in its *Standards Relating to Providing Defense Services* (1968):

> "The concept of providing counsel to those in need of a lawyer in criminal proceedings and unable to retain one is not a novelty in American law. Our courts have undertaken to protect persons accused of crime and lacking legal representation since the earliest periods of our history." *Id.* at 2.

[22]The inappropriateness of such a parallel is explored further in Point II B 2, *infra.*

Merely to pose the question is to suggest the answer. The Criminal Justice Act was enacted in order "to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases". *United States v. Tate,* 419 F.2d 131, 132 (6th Cir. 1969). It was designed to satisfy the promise of *Johnson v. Zerbst,* 304 U.S. 458 (1938), that no defendant should be forced to stand trial in a federal criminal prosecution without the assistance of counsel. Counsel appointed under the Act owes his primary obligation to the defendant and not to the court or the public at large. His duties, burdens and responsibilities are "exactly the same" as those of private, retained counsel. Burger, *Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards,* 8 Amer.Crim. Law Q. 1, 6 (1969). This parity between appointed and retained counsel was envisioned by the framers of the Act and has been recognized by all who have scrutinized the relationship. The *Standards Relating to Providing Defense Services* approved by the American Bar Association House of Delegates in February, 1968, set forth the basic principle that defenders and assigned counsel "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice". *Id.* Section 1.4 at 6. As the commentary thereto points out, "[a] system which does not guarantee the integrity of the professional relationship is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain." *Id.* at 19. It is this freedom of action that Congress had in mind when it enacted the Criminal Justice Act. That Act establishes a system of compensating appointed counsel who are independent of

government control, owe their loyalty soley to the client, and are free to perform their functions in as nearly as possible the same manner as if privately retained. Nowhere is this single-mindedness of purpose more starkly revealed than in the initial rejection of the creation of a federal defenders organization [*See* Point I, *supra*].

As Congressman Arch Moore, Jr., the Act's author, noted:

> "Beyond question, the primary objection to the creation of a Federal Public Defender Office is the fear that it will undermine the Anglo-Saxon tradition in America of combative trial proceedings where the lawyer for the defendant is free of State control and thereby free to render the best defense he is capable of making." 110 Cong.Rec. 445 (January 15, 1964).

The sum and substance of the legislative history of the Criminal Justice Act manifest a singular objective: to provide *private* counsel for the indigent who cannot afford to retain one. Congress did not thereby create a new function, it merely made available an already existing one to those without financial means. The duties, responsibilities and burdens of the appointed counsel were designed to mirror in every way those of retained counsel.

It is not likely that Congress enacted the Criminal Justice Act ignorant of the common-law malpractice liability under which lawyers labor. Indeed, the vast majority of the legislators are attorneys themselves. Yet, in spite of this recognition, no suggestion was made on the part of any congressman regarding the need for immunity and the language of the Act is silent on the subject. In *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951), this Court concluded that Congress's silence in §1983 respecting immunity may be properly read as preserving intact the existing

state of affairs under common law. There is no reason to depart from this sound rule of construction in the instant case. Congress acts in the context of existing common-law rules, and in construing a statute a court considers the "common law before the making of the Act." *Heydon's Case,* 3 Co.Rep. 7a, 7b, 76 Eng.Rep. 637, 638 (Ex. 1584) *quoted in Pierson v. Ray,* 386 U.S. 547, 561 (1967) (Douglas, J., dissenting).

B. Consideration of the Interests of the Defendant, the Government and the Appointed Counsel Reveals that All Three Would be Best Served by Permitting Civil Accountability.

The Court's recent immunity cases have attempted to reconcile the dilemma the immunity doctrine poses by balancing the often conflicting interest of "the injured party's legal right to seek redress for the wrong done him" and "the public's interest in fearless decisionmakers free from harassment who are also conscientious and responsible in performing their public duties." *The Supreme Court, 1977 Term,* 92 Harv.L.Rev. 57, 272 n. 45 (1978). A consideration of these interests in the context of the present case not only fails to reveal a conflict between these interests but, in fact, starkly exposes the dangers of immunity to the Sixth Amendment's guarantee of the effective assistance of counsel.

1. The Injured Party's Legal Right to Redress.

As this Court has long recognized, "the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970). The promise of *Johnson v. Zerbst,* 304 U.S. 458 (1938); *Gideon v. Wainwright,* 372 U.S. 335 (1963); and *Argersinger v. Hamlin,* 407 U.S. 25 (1972), means little if it does not mean the right to effective counsel. The duty to assign counsel is not discharged by the mere assignment. *Powell v. Alabama,* 287 U.S. 45, 71 (1932).

In his 1973 John F. Sonnett Memorial Lecture at Fordham Law School, the Chief Justice reminded us that "[t]he high purposes of the Criminal Justice Act will be frustrated unless *qualified* advocates are appointed to represent indigents". Burger, *The Special Skills of Advocacy,* 42 Fordham L.Rev. 227, 230 (1973) (emphasis original). "In some places," reported the Chief Justice, "it is the observation of judges that the Criminal Justice Act has not brought about improvement in the general quality of criminal defense and that performance has not been generally adequate." *Id.* at 237. This case calls on the Court to decide what remedies it will countenance where the gross inadequacy of the performance results in the unwarranted deprivation of human liberty. Shall the consequences of such substandard criminal defense work fall solely on the indigent defendant?

The conduct alleged in the plaintiff's pleadings, if proved, would establish blatant incompetence. No trial tactic, no exercise of discretion, no professional judgment can possibily justify the failure to move to dismiss three counts of an indictment which, on their face, reveal an absolute statute of limitations defense. The error is plain. The prejudice is completely nonspeculative.

Were respondent here retained counsel the remedy at common law would be clear. Solely because Ferri lacked the financial means to retain counsel on his own, however, the decision below would deprive him of an equivalent opportunity to remedy this wrong. [The equal protection implications of such a distinction are treated in Point III, *infra*]. The irony of this dichotomy is that it is the poor who have the greatest need for such a remedy. Quite aside from the generally lower quality (or motivation) of appointed counsel, *see* Note, *Providing Counsel for the Indigent Accused: The Criminal Justice Act,* 12 Amer.Crim. L.Rev. 789,821 (1975); Bazelon, *The Defective Assistance of Counsel,* 42 U.Cinn. L.Rev. 1 (1973), the client with such counsel can exercise none of the traditional quality controls enjoyed by one who can afford retained counsel. The Criminal Justice Act plans generally deny the right to select counsel of one's own choosing. *See, e.g.,* Western District of Pennsylvania Criminal Justice Act Plan, Section V A(3). The right to seek removal and substitution of counsel perceived as incompetent is severely restricted. *See, e.g., United States v. Michelson,* 559 F.2d 567, 572 (9th Cir. 1977); *United States v. Malizia,* 437 F.Supp. 952, 955 (S.D.N.Y. 1977), *aff'd. mem.,* 573 F.2d 1298 (2d Cir. 1978). The client with appointed counsel lacks even the comfort of knowing that counsel is being assisted or supervised by a superior as may be the case where a public defender is employed.

That a habeas corpus remedy may lie for the ineffective assistance of counsel is no basis for affording malpractice immunity. Even assuming that the malpractice is one of constitutional dimension, habeas corpus is not an adequate remedy. The relief it offers is solely prospective in nature. A proper system of remedies should provide redress to injured parties by compensating them for losses suffered, it should

provide sanctions against the party responsible for the injury and it should deter others similarly situated from repeating the conduct which led to the injury. Measured by these goals, habeas corpus is probably the least practical means of dealing with ineffective assistance of counsel. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures From Habeas Corpus,* 59 Va.L.Rev. 927, 970-971 (1973). It compensates no one; it delivers no sanctions against the source of the problem; and its deterrent effect on defense counsel is virtually non-existent. Ironically, habeas corpus holds only the government accountable even though its control over the unconstitutional conduct is ever so slight. *Id.*[23]

The remedies of reprimand, censure, suspension and disbarment of negligent lawyers are similarly unavailing. Judges and prosecutors rarely initiate them and the poorly represented defendant, for whom these remedies provide no compensation, has little incentive to seek such sanctions against his former counsel. Bines, *supra,* at 972-973.

In short, it is the malpractice action which affords the only viable remedy. *See Link v. Wabash R.Co.,* 370 U.S. 626, 634 n. 10 (1962) [". . . if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice".] It alone can compensate the criminal

[23]The availability of habeas corpus for ineffective assistance of counsel is at best speculative. Courts are most hesitant to allow such claims to become opportunities for relitigating questions disposed of on direct appeal or raising underlying issues not cognizable on habeas review. *See, e.g., Beasley v. United States,* 491 F. 2d 687, 690 (6th Cir. 1974). Moreover, the prisoner who seeks habeas corpus and loses may find his negligence action dismissed as collaterally estopped. *See Lamore v. Laughlin,* 159 F.2d 463 (D.C. Cir. 1947).

defendant for his unlawful conviction and imprisonment. It alone can provide such compensation at the expense of the party most responsible for whatever injustice has occurred. Finally, it alone can effectively deter undesirable future conduct and encourage strict adherence to the Code of Professional Responsibility and traditional standards of adequate defense representation.

2. The Public's Interest in Zealous Advocates Who Conscientiously and Responsibly Perform Their Public Duties.

As this Court has so frequently recognized, immunity is not granted for the benefit of the erring official. It is, instead, intended solely "for the benefit of the public whose interest it is that the [officials] should be at liberty to exercise their functions with independence and without fear of consequences." *Scott v. Stansfield,* L.R. 3 Ex. 220,223 (1868), *quoted in Pierson v. Ray,* 386 U.S. 547,554 (1967). *See Gregoire v. Biddle,* 177 F.2d 579,581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950). Yet the public interest that prompts the grant of absolute immunity to judges and prosecutors is non-existent where court-appointed counsel are involved. *See Spring v. Constantino,* 168 Conn. 563, 566-567, 362 A.2d 871, 875 (1975); *Barto v. Felix,* 378 A.2d 927,931 (Pa. Super. 1977). A prosecutor or judge owes his primary duty of allegiance to the general public. In the course of that duty he is commanded to seek sanctions against or punish unwilling defendants. Although it is recognized that there will be an occasional prosecutor or judge who will act erroneously, maliciously or even corruptly, it has been thought better in the long run to leave

unredressed these wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. *Gregoire v. Biddle, supra,* 177 F.2d at 581. To guarantee that their loyalties are not divided between the imposed duty to the public to insure justice and the natural instinct to protect oneself from suit, absolute immunity is afforded to judges, *Stump v. Sparkman,* 435 U.S. 349 91978); *Pierson v. Ray,* 386 U.S. 547 (1967), and prosecutors, *Imbler v. Pachtman,* 424 U.S. 409 (1976). The key concern in these decisions has been the tension or conflict that exists between the public need and the fear of suit.

An appointed counsel, on the other hand, is not a servant of the public. His duty is undivided, whether measured by the Code of Professional Responsibility [E.C. 5-1 provides that the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client], the ABA Standards Relating to The Defense Function [§1.6 is entitled "Clients Interests Paramount"], or the Criminal Justice Act [*See, e.g.,* Section V E(7) of the Western District Plan]. He serves only the client for whose representation he has been appointed. It is difficult to see, therefore, how potential liability for failing to provide a competent defense divides a lawyer's loyalties between himself and the person he is supposed to defend. As one commentator has noted, "If anything potential liability should promote greater devotion to the clients' cause, at least if the experience of a hundred odd years of tort liability for professional malpractice has not been wrong." Bines, *supra,* 59 Va.L.Rev. at 980 n. 235. Certainly, the argument of divided loyalty has never successfully been interposed as a defense by physicians in such civil malpractice actions. It would indeed be ironic if we were to grant counsel an

immunity from suit by the sole person to whom a duty is owed.

Far from preventing the spectre of competing loyalties, the grant of immunity here would actually create such conflict. An appointed counsel stands unique among the categories of officials treated by this Court in its immunity cases. At the very same time that he is representing the indigent pursuant to his appointment, he is maintaining a private practice. [Compare the situation of the Federal Public Defender who is prohibited from engaging in the private practice of law, *see* 18 U.S.C. §3006A(h)(2)(A); Western District Plan, Section II C(7)]. His private practice, of course, is potentially a source of a common-law malpractice action. There has always been the concern that "the busy lawyer" who receives an appointment will render a perfunctory service at best. *See* ABA *Standards Relating to Providing Defense Services,* at 25 (1968). The pay is seldom competitive and the clients are seldom a source of future business. How much more serious is this concern, however, where only the paying portion of his practice may subject the attorney to malpractice liability. It calls for little speculation to predict that a lawyer, hard pressed for time, will be likely to devote an inappropriate percentage of his energies to the portion of his practice which carries with it the possibility of liability for substandard work. The statutory duty to the indigent is here at odds with the natural instinct to protect onself from suit. Ironically, therefore, the very tension which the grant of immunity to judges and prosecutors was adopted to alleviate would instead be promoted by a similar grant of immunity to a court-appointed counsel. The grave danger that affording such immunity would prompt counsel to neglect his appointed clients in favor of his retained ones is reason enough to deny it.

A number of lower court decisions have expressed concern about two additional problems allegedly posed by potential liability: (1) that the spectre of such liability will make it difficult to recruit able attorneys to take appointments, *see Minns v. Paul,* 542 F.2d 899, 901 (4th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977); and (2) that the fear of suit will prompt appointees to press frivolous claims for their clients. *See Robinson v. Bergstrom,* 579 F.2d 401, 409 (7th Cir. 1978).[24] Neither concern withstands scrutiny.

The argument that there are not enough able lawyers willing to take on appointments that subject them to potential malpractice liability ignores several critical considerations. Private attorneys are already subject to suit by their retained clients. Accordingly, many already have liability insurance for protection. There is no reason to believe that such policies would not equally cover suits by non-paying clients. Indeed, it would not be surprising to find that many of the appointed counsel sued to date were represented in such actions by counsel provided by their insurer.

Attorneys are certain to continue to be available for appointment so long as representation is compensated. While the current rates of compensation, $30 per hour for court time and $20 per hour for preparation time (18 U.S.C. §3006A(d)(1)), may not always be competitive, they are certainly adequate to attract many of the burgeoning numbers of law school graduates. *Cf. Argersinger v. Hamlin,* 407 U.S. 25, 37 n. 7 (1972) ["Indeed, there are 18,000 new admissions to the bar each year - 3,500 more lawyers than are required to fill the 'estimated 14,500 average annual openings' "]. The fear that these rates will not attract

[24]Both *Minns* and *Robinson* considered these concerns in the context of potential §1983 liability and not under common-law suits.

"competent counsel" if potential liability accompanies appointment is equally unsound.[25] In the Southern District of New York, for example, where a stringent certification process was undertaken to select adequate counsel for criminal defendants, competition for assignments has been rigorous. *See* Burger, *The Special Skills of Advocacy,* 42 Fordham L.Rev. 227, 239 n. 24 (1973). As in *Argersinger,* therefore, the argument that a lack of available lawyers militates against the protection of a criminal defendant's constitutional rights is factually incorrect. *See Scott v. Illinois,* ____ U.S. ____, 99 S.Ct. 1158, 1162 (1979).

The argument that the threat of possible suit by clients will prompt appointed counsel to press frivolous claims is similarly unavailing. The ABA Code of Professional Responsibility is equally binding on retained and appointed counsel, and there is no reason to believe that an attorney who refuses to press frivolous claims for his paying clients will do otherwise for his indigent ones. *See* E.C. 7-4: "A lawyer is not justified in asserting a position in litigation that is frivolous." If anything, the impetus is greater in the former situation where no maximum compensation is set by law. *Cf.* 18 U.S.C. §3006A (d)(2) [compensation shall not exceed $1000 for each attorney in a felony case]. While it may be true that, since he does not pay for counsel's services, the indigent may be less deterred from pressing his attorney to present frivolous claims (although his position seems little different from the private client who frequently pays for

[25]Even if factually accurate the argument proves nothing. At present, less than 3¢ of the federal judicial dollar is utilized for compensating appointed counsel. *See* 1977 Annual Report of the Director of the Administrative Office of the United States Courts 50, Appx. II. That this financial commitment may be inadequate to attract able lawyers is hardly justification for immunizing incompetence.

criminal defense work under an agreed-in-advance set fee rather than an hourly rate), it is equally true that the attorney, bound, absent unusual circumstances, to (d)(2)'s maximum compensatory limits, is less likely to accede to the requests. The speculative possibility of having to defend, at some unknown time in the future, a suit charging failure to pursue a frivolous claim, is hardly likely to prompt the immediate expenditure of uncompensated time in the mere hope of discouraging such a liability action.[26] Realistically, therefore, potential liability is unlikely to induce appointed counsel to do too much. Far more serious is the possibility that immunity, in conjunction with the ceilings on compensation, will prompt him to do too little.

For all of the foregoing reasons, the creation of immunity would pose a danger to the government's interest, manifested by the passage of the Criminal Justice Act, in delivering equal justice to the poor. As important as justice, however, is the appearance of justice. The American Bar Association has long recognized the need to "remove any basis for an implication that defense attorneys under the [appointed] system are in any way subject to the control of those who appear as their adversaries or before whom they must appear." ABA *Standards Relating to Providing Defense Services* 21 (1968). Equally significant is the need to remove any implication that such attorneys carry fewer responsibilities, duties or burdens than their retained counterparts. Selective grants of immunity dependent upon the source of compensation achieve nothing in this direction. Inequalities

[26]The fact that compensation under the Criminal Justice Act is usually set by the judge before whom the case was tried, 18 U.S.C. §3006A(d)-(4), operates as a further constraint on the overzealousness of appointed counsel.

of this nature "are quickly perceived by those who are being provided representation and may encourage cynicism toward the justness of the legal system and, ultimately, of society itself." *Id.* at 19. If the incompetency level of appointed counsel is as great as some have perceived, *see* Bazelon, *The Defective Assistance of Counsel,* 42 U.Cinn.L.Rev. 1 (1973), it hardly seems worthy of the legal profession's integrity to build a wall of immunity around it.

3. The Interest of Appointed Counsel.

Barr v. Matteo, 360 U.S. 564, 565 (1959), recognizes only "two considerations" of high importance in defining the nature and scope of immunity: on the one hand, the protection of the individual citizen against pecuniary damage; and on the other, the protection of the public interest. That no attention was paid to the plight of the particular officer, except insofar as it affected the performance of his public duties, is not surprising. In the context of a public officer whose duties are owed only to the public, the interests of the officer and the public are synonymous. Where, as here, the duty imposed is one to the client, it similarly cannot be contended that the interest of the attorney presents a third factor for consideration. The professional judgment of a lawyer must be exercised, within the bounds of the law, "solely for the benefit of his client and free of compromising influences and loyalties." ABA *Code of Professional Responsibility* E.C. 5-1.

The duty of an attorney to his client has long been considered jeopardized by an absence of accountability. Accordingly, while a lawyer may insure himself against malpractice, he may not "attempt to exonerate himself from

or limit his liability to his client for his personal malpractice." ABA *Code of Professional Responsibility* D.R. 6-102. As the Code appropriately recognizes:

> "A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so." ABA *Code of Professional Responsibility* E.C. 6-6.

Quite clearly the Bar has never believed that the spectre of potential liability discourages professional discretion in the discharge of a lawyer's duties.[27] Indeed, E.C. 6-6 is immediately followed by Canon 7 requiring a lawyer to represent his client zealously within the bounds of the law. There is nothing inconsistent in these commands. To the contrary, they enforce the notion that the attorney's and client's interests, within the bounds of the law, are identical.

In medical malpractice cases the courts have never recognized the claim that zealous and fearless protection of a patient's health requires freedom from accountability by civil suit. The interest of physician and patient in the treatment of the latter has instead been handled as congruous. The mere fact that the source of the physician's compensation may have been government Medicaid funds has never called for a different rule.[28] To treat the legal profession otherwise would be neither prudentially desirable nor rationally defensible.

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[27]In any event, what took place in the instant case cannot be deemed an exercise of professional discretion even by the most liberal interpretation of that term.

[28]Compare Congressional treatment of Armed Forces medical personnel, 10 U.S.C. §1089 (1977) [an action against the United States is the sole remedy for injuries resulting from the negligent or wrongful acts or omissions of such medical personnel].

III.

AFFORDING A FEDERAL COMMON-LAW IMMUNITY TO ATTORNEYS APPOINTED TO REPRESENT INDIGENTS WHERE NO SUCH IMMUNITY IS AFFORDED RETAINED COUNSEL WOULD CONSTITUTE A CLASSIFICATION BASED SOLELY ON WEALTH PROHIBITED BY THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.[29]

In formulating or enforcing the common law, courts are bound by the restrictions imposed by the Constitution. *See Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938); *Shelley v. Kraemer,* 334 U.S. 1, 17-18 (1948). One of the most fundamental of those restrictions is that no person may be denied the equal protection of the laws. That the "law" under consideration may be judicially composed rather than legislatively conceived is no justification for different standards. *See Shelley v. Kraemer, supra.*

American common law has never accorded immunity to retained criminal defense counsel. *See, e.g., Lamore v. Laughlin,* 159 F.2d 463 (D.C. Cir. 1947) [*Compare* the current English system which immunizes barristers but not solicitors. *Rondel v. Worsley,* 1 A.C. 191 (H.L. 1969)]. The creation and application of a different rule for those paid to represent indigent criminal defendants would result in the denial, solely on the basis of poverty, of two inherently

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[29]This equal protection argument was raised below (A. 31), implicitly rejected by the majority (*see* dissent of Roberts, J. at A. 57) and is well within the confines of the issue on which certiorari was granted. *See also* Petition for Certiorari at 6.

fundamental rights: the right to the effective assistance of counsel and the right of access to the courts. *See* dissent of Roberts, J. below (A. 57). The first of these is prophylactic. The second is compensatory.

A. The Grant of Absolute Immunity Establishes a Lower Standard of Care For Appointed Counsel Than for Retained Counsel.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois,* 351 U.S. 12, 19 (1956). There is little that is more critical in this respect than the right to the assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335 (1963). The mere appointment of counsel does not alone suffice. The circumstances of the appointment may be as important as the assignment itself, *Powell v. Alabama,* 287 U.S. 45,71 (1932), for the right to counsel means nothing if it does not mean the right to effective counsel. *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970). Too many important constitutional rights may be lost by the actions of one's attorney to demand anything but an uncompromising, competent lawyer with undivided loyalty to his client. Anything less simply cannot comport with the requirements of the Sixth Amendment.

An individual with financial means can hire counsel of his choosing, substitute new counsel if he is dissatisfied and sue him if his incompetence causes loss of property or liberty. The Criminal Justice Act denies the indigent the first of these, severely limits the opportunity for the second and now it would seem, if the lower court is to prevail, the third shall be lost as well. A counsel without accountability poses far greater dangers of ineffectiveness. It is just such a concern

that prompted D.R. 6-102 of the ABA Code of Professional Responsibility, prohibiting retained counsel from entering into a contractual arrangement with his client "to exonerate himself from or limit his liability to his client for his personal malpractice." To allow a different situation to prevail with appointed counsel would constitute a denial of equal protection. That immunity in the latter situation would be imposed by common law while the Code's prohibition is solely against client-granted immunity hardly provides a rational distinction.

Certainly this differential treatment could not be what the Criminal Justice Act Plan of the Western District intended when it provided in Section V E(7):

> "Attorneys appointed pursuant to any provision of this Plan shall conform to the highest standards of professional conduct, including but not limited to the provisions of the American Bar Association's draft code of Professional Responsibility."

Neither does it seem that this is what the Chief Justice had in mind when he wrote that appointed counsel have "exactly the same duties *and burdens* and responsibiliies as the highly paid, paid-in-advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards,* 8 Amer.Crim. Law Q. 1, 6 (1969) [emphasis supplied]. No burden would seem more significant than being held accountable for one's omissions and commissions.

It is, of course, fair to presume that many, if not most, appointed counsel carry out their court-ordered responsibilities as they would their regular practice despite the differential in pay. That they would continue to do so were absolute immunity conferred cannot, however, be similarly

presumed.[30] The complete loss of accountability is bound to take its toll. A habeas corpus petition alleging ineffective assistance of counsel, even if granted, imposes no sanctions. Disciplinary proceedings are infrequent and generally ineffective as a deterrent to others. The prophylactic need for potential liability therefore is essential. As Professor Tribe has recognized, lawyers are "likely to be somewhat more obtuse to the merits of indigents' claims than to those of nonindigents." L. Tribe, *American Constitutional Law* §16-36 at 1105 (1978). Counsel for indigents generally need an "extra push" in order to ensure that they pursue their clients' interests as zealously as would retained counsel. *Id. See also Anders v. California,* 386 U.S. 738 (1967). The need for an "extra push" here is concededly not constitutionally compelled. To fail to provide the *same* push that is experienced by retained counsel would, however, contravene the requirements of equal protection.

B. The Right to Compensatory Relief For the Deprivation of Liberty Suffered as a Consequence of Incompetent Counsel Cannot Be Made To Depend Solely on the Financial Status of the Injured Party.

A government cannot deny access, simply because of one's poverty, to a "judicial proceeding [that is] the only effective means of resolving the dispute at hand." *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971). Yet that is exactly what would transpire if the absolute immunity sought by

[30]This is especially so where the attorney would, as here, remain liable in malpractice on the "private" side of his practice. *See* Point II B 2, *supra.*

Ackerman were to be granted. Far more is involved here than the mere existence of a small filing fee. *Cf. United States v. Kras,* 409 U.S. 434 (1973); *Ortwein v. Schwab,* 410 U.S. 656 (1973). More indeed is involved than even the substantial impediments to court access struck down by this Court in *Bounds v. Smith,* 430 U.S. 817 (1977) [state's failure to provide prison legal research facilities] and *Johnson v. Avery,* 393 U.S. 483 (1969) [prison regulations prohibiting inmates from assisting other prisoners in preparation of legal papers]. In short, we deal here with a total closing of the courtroom door.

There is, of course, no more a constitutional right to sue for malpractice than there is to sue for wrongful death. Once such an action has been accorded by statute or common law, however, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet,* 405 U.S. 56,77 (1972). *See also Levy v. Louisiana,* 391 U.S. 68 (1968); *Glona v. American Guarantee Co.,* 391 U.S. 73 (1968). Such a denial is all the more offensive when no alternative remedy is available.

Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty," *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 395 (1971). A defendant who has lost his liberty by virtue of his appointed counsel's incompetence often has no other remedy. A habeas corpus petition is merely prospective in nature and provides no compensatory relief. No action lies against the Government under the Federal Tort Claims Act. *Jones v. Hadican,* 552 F.2d 249, 251 n. 4 (8th Cir.), *cert. denied,* 431 U.S. 941 (1977). *Cf.* 10 U.S.C. §1089 (1977). [creating an exclusive action against the United States for the negligence of Armed Forces medical

personnel]. Finally, no action would lie directly under the United States Constitution. *Housand v. Heiman*, ____ F.2d ____ (2d Cir. March 20, 1979), slip op. 1827 1829 n.1 [Criminal Justice Act lawyer does not act under color of federal law].

Absolute immunity deprives an indigent of the only "effective means" of recovering for liberty lost by virtue of incompetent counsel. In contrast, the person with means to retain counsel is permitted free access to the courts for the identical injury. Assuredly, such classification requires some assertion of a compelling or at least significant governmental reason.[31] Yet not even a rational basis justifying this distinction appears evident.

C. No Rational Basis Exists For Having The Grant of Immunity to Defense Counsel Depend Upon the Source of Compensation.

A retained defense counsel in a federal criminal prosecution may be sued in a subsequent state common-law action for malpractice committed in preparing and conducting the defense. No legitimate reason exists for treating appointed counsel differently. All of the arguments that have been pressed for the grant of absolute immunity apply with equal force to retained counsel. He is similarly a part of the

[31]Because no statute is being assailed here, the concomitant need for deference to the legislative process is absent. The traditional reluctance to interfere with the choices made by the people's representatives has no place where common-law doctrines are the subject of attack. Accordingly, the powerful presumption of validity prompted by this deferential attitude to the majoritarian ideal dissipates when it is judicially composed doctrines that are being scrutinized.

"judicial process," a participant in a federal criminal prosecution, and an "officer of the court." He certainly has no less of a need to exercise his "full professionalism." In *Minns v. Paul*, 542 F.2d 899 (4th Cir. 1976), the court wrote of the need for "unfettered discretion. . .to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Id.* at 901. The importance of identifying and discarding claims without merit; of dividing time between clients; and of deciding how best to protect an individual client's interest is not limited to the representation of indigents. All lawyers confront the same difficulties. All face the same ethical dilemmas. All are forced to deal with the same problems of judgment.

Minns, supra, also suggested as justification the need to recruit and hold able lawyers to represent indigents. Even if it were true that the potential liability would "scare away" some competent attorneys,[32] it seems far more likely that it would be the incompetent ones who would be prompted to avoid appointed cases. If lawyers know they can be sued, they will not take on cases they know they are not qualified to handle. In any event, the grant of immunity in this selective manner is not a rational means to encourage the increased participation of competent counsel. By creating, in the appointed counsel, a person with potential liability in only a portion of his practice, the grant of immunity poses far greater danger to the level of representation under the Criminal Justice Act than is posed by the speculative "scaring off" of a small number of able attorneys. Without immunity those who do seek appointments are likely to be

[32]*See* Point II B 2, *supra* for further treatment of this contention.

zealous advocates. With it, the appointees will all too frequently neglect that portion of their practice that holds them unaccountable. Any minimal increase in numbers, therefore, will be far offset by the decline in quality of participation.

If the Criminal Justice Act is unable to attract a sufficient number of able attorneys (and, at least in the Southern District of New York, this does not seem to be the case, *see* Burger, *The Special Skills of Advocacy,* 42 Fordham L.Rev. 227, 239 n. 24 (1973)) immunity from liability for incompetent conduct is, at best, an irrational means to remedy the problem.[33]

When the articulated justifications are swept aside as facade, all that remains is a fear that the indigent will be more litigious and more likely to press frivolous claims. Presumably such a rationale would also justify minimum income levels for the filing of §1983 claims. Our Constitution prohibits such invidious generalizations, *see James v. Strange,* 407 U.S. 128 (1972); *Lindsey v. Normet,* 405 U.S. 56 (1972), and this Court, as the ultimate defender of the Constitution, ought not allow them to serve as the basis for a discriminatory common-law doctrine of immunity.

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[33]Among the rational approaches to dealing with a low level of participation by the bar are reasonable rates of compensation, ABA *Standards Relating to Providing Defense Services,* at 30 (1968) and enforcing mandatory participation by members of the bar. Note, *Providing Counsel for the Indigent-Accused: The Criminal Justice Act,* 12 Amer. Crim. L. Rev. 789, 813 (1975). *See also United States v. Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966) [representation of indigents described as "a condition under which lawyers are licensed to practice as officers of the court"].

CONCLUSION

The judgment of the Pennsylvania Supreme Court should be reversed and the case remanded.

Respectfully submitted,

/s/JULIAN N. EULE
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Court-appointed
Counsel for Petitioner

May 1979

APPENDIX A

The Criminal Justice Act, 18 U.S.C. §3006A, in pertinent part provides:

§3006A. Adequate representation of defendants

(a) Choice of plan. - Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. Representation under each plan shall include counsel and investigative, expert, and other services necessary for an adequate defense. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

(1) attorneys furnished by a bar association or a legal aid agency; or

(2) attorneys furnished by a defender organization, established in accordance with the provisions of subsection (h).

Prior to approving the plan for district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel. - Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in section 1 of this title) or with juvenile delinquency by the commission of an act which if committed by an adult, would be such a felony or misdemeanor or with a violation of probation and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives representation by counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate or the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and substitution of appointments. - A person

for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation. -

(l) Hourly rate. - Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $30 per hour for time expended in court or before a United States magistrate and $20 per hour for time reasonably expended out of court, or such other hourly rate, fixed by the Judicial Council of the Circuit, not to exceed the minimum hourly scale established by a bar association for similar services rendered in the district. Such attorney shall be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate or the court.

(2) Maximum amounts. - For representation of a defendant before the United States magistrate or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in a case in which one or more felonies are charged, and $400 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $1,000 for each attorney in each court. For representation in connection with a post-trial motion made after the entry of judgment or in a probation revocation proceeding or for representation provided under subsection (g) the compensation shall not exceed $250 for each attorney in each proceeding in each court.

(3) Waiving maximum amounts. - Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate if the representation was furnished exclusively before him certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit.

(4) Filing claims. - A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate and the court, and to each appellate court before which the attorney represented the defendant. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was

pending before the United States magistrate and the court, and the compensation and reimbursement applied for or received in the same case from any other source. The court shall fix the compensation and reimbursement to be paid to the attorney or the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

The Criminal Justice Act Plan of the Western District of Pennsylvania provides, in pertinent part:

* * *

II. SOURCES OF REPRESENTATION

A. *Panel of Attorneys*

(1) The bar associations of the several counties within the district have prepared and certified to this Court a list of attorneys who, in the opinion of each certifying bar association, are competent to give adequate representation to parties under the Act, and who are willing to serve. The Court has on the basis of such lists and its own inquiry, established and approved a panel of attorneys. The Court ratifies such existing panel and such existing procedures.

(2) Additions to and deletions from the panel of attorneys will be made periodically by the Court, so that

there shall be sufficient names on the list to provide adequate representation to persons financially unable to obtain adequate representation, and to distribute the work fairly among the members of the Bar. In making such additions and deletions, the Court shall not be limited to the lists furnished by the several bar associations.

* * *

C. *Federal Public Defender Organization*

(1) In addition to the use of private attorneys, the Court has determined that the use of a Federal Public Defender Oganization as defined in 18 U.S.C. 3006A(h) (2) will facilitate the representation of persons entitled to the appointment of counsel under the Criminal Justice Act and that the Western District of Pennsylvania is a district in which at least two hundred persons annually required the appointment of counsel pursuant to 18 U.S.C. 3006(h) (1).

* * *

(7) Neither the Federal Public Defender nor any staff attorney appointed by him may engage in the private practice of law.

* * *

III. DETERMINATION OF NEED FOR COUNSEL

B. *Counsel for Person Arrested when Representation is Required by Law.*

(1) Where a person arrested has been represented by counsel before his presentation before a judicial officer under circumstances where such representation is required by law, his counsel may subsequently apply to

the court for approval of compensation. If the court finds such person has been and is then financially unable to obtain adequate defense, that his counsel is on the panel of attorneys approved by the court, and that such representation was required by law, compensation will be made retroactive to cover out-of-court time expended by the attorney during the arrest period, and in addition cover compensation for services rendered from the time of his initial presentation before a magistrate, or the court, as the case may be.

(2) The court or the magistrate may make retroactive appointment of counsel where such attorney is on the panel of attorneys approved by the court and will continue to represent such party in subsequent proceedings before this court.

* * *

V. APPOINTMENT OF COUNSEL

A. *By the Court or the Magistrate*

(1) Unless the defendant waives representation of counsel, the court or the magistrate, if satisfied after appropriate inquiry in accordance with Subtitles A, B, C and D of Title III, that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him.

* * *

(3) No such defendant shall have the right to select his appointed counsel from the list of attorneys, Federal Public Defender Organization, or otherwise.

(4) The court or the magistrate shall in appointing such counsel use the list of attorneys approved by the court or the Federal Public Defender Organization, except in

extraordinary circumstances where it becomes necessary to make another selection of a member of the bar of this Court.

* * *

B. *Ratio of Appointments*

The judge or magistrate will determine whether any party entitled to representation will be represented by a private attorney on the approved panel of attorneys or by the Federal Public Defender Organizations. However, insofar as practicable, private attorney appointments will be made in at least twenty-five percent of the cases.

* * *

E. *Duties of Appointed Counsel and Defendant*

(1) Counsel appointed by a judge or magistrate shall, unless excused by order of court, continue to act for the party throughout the proceedings in this court.
(2) If requested to do so by the party whom he represents, counsel appointed under this Plan shall file a timely Notice of Appeal, and his appointment shall continue on appeal unless, or until, he is relieved by the Court of Appeals.
(3) It shall be the duty of counsel, appointed under this Plan, to represent a defendant incarcerated at the time of his appointment to consult with the defendant at his place of incarceration as promptly as possible, and not later than three days from the date of the mailing of the order of appointment.
(4) No appointed counsel may request or accept any payment or promise of payment for assisting in the

representation of a defendant, unless such payment is approved by order of court.
(5) If at any time after his appointment counsel should have reason to believe that a party is financially able to obtain counsel or to make partial payment for counsel, he shall advise the court.
(6) It shall be the duty of any defendant released on bail, and for whom counsel is appointed, to report to such counsel at his office or at such other convenient place as counsel may designate. This should be done as promptly as possible and not later than five days from the date of the order of appointment.
(7) Attorneys appointed pursuant to any provision of this Plan shall conform to the highest standards of professional conduct, including but not limited to the provisions of the American Bar Association's draft "Code of Professional Responsibility".

F. *Duration, Substitution and Redetermination of Need*

* * *

(4) If at any time after appointment of counsel, the court or magistrate finds that the person is financially able to obtain counsel or to make partial payment for representation or other services, it may terminate the appointment of counsel or it may authorize or direct that such funds be paid to the appointed attorney, to any person or organization authorized to render investigative, expert, or other services or to the court for deposit in the Treasury as a reimbursement to the appropriation.

VI. CLAIMS FOR COMPENSATION

* * *

(7) If the case has proceeded to trial the Clerk of Court Shall present the claim for compensation to the trial judge.

(8) If the case does not proceed to trial and is concluded by sentence on a plea the Clerk shall present the claim for compensation to the sentencing judge.

[This Amended Plan was approved by the Judicial Council of the Third Circuit on June 12, 1974]

See also the Joint Appendix at 36 for additional operating procedures adopted by the Board of Judges.

APPENDIX B

INDICTMENT 74-277 FILED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN *UNITED STATES V. FERRI*

Form DJ-15
(Ed. 2-3-66)

No. 74-277 Criminal

UNITED STATES ..... COURT

Western ..... District of Pennsylvania

..... Division

THE UNITED STATES OF AMERICA

vs.

FRANCIS D. FERRI a/k/a "RICK"
JOSEPH LAVERICH
KENNETH R. MATTHEWS

INDICTMENT

Count I: Maliciously damaging or attempting to damage by means of explosive of any property, etc. used in interstate commerce; conspiracy. (18 USC §844(i) and 371)(all defendants); Count II: Maliciously damaging or attempting to damage by means of explosive of any property, etc. used in interstate commerce; aiding and abetting. (18 USC §844(i) and 2)(all defendants): Counts III thru VI: Mail Fraud (18 USC §1341)(Matthews): Count VII: Receiving or possessing a firearm which is not registered (26 USC §5861(d) and aiding and abetting (18 USC §2)(all defendants); Count VIII: Receiving or possessing a firearm. (26 USC §5861(c) and aiding and abetting (18 USC §2) (all defendants) and Count IX: Making a firearm (26 USC §5861(f) and aiding and abetting (18 USC §2)(all defendants)

A true bill,

Ralph Hamilton
Foreman.

Filed in open court this ..... *day of* ....., *A. D. 19*....

.....
Clerk.

Bail, $.....

Richard L. Thornburgh

GPO 902-493

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	No. 74-277
v.	)	Criminal (18
FRANCIS D. FERRI	)	U.S.C. §2, 371,
a/k/a "RICK"	)	844(i) and 1341;
JOSEPH LAVERICH	)	26 U.S.C.
KENNETH R. MATTHEWS	)	§5861(c),
	)	5861(d),
	)	5861(f) and
	)	5871
	)	

Filed
Aug. 28, 1974
Bernhard Schaffler
Clerk, U.S. District Court
West. Dist. of Pennsylvania

FIRST COUNT

The Grand Jury charges:

That from on or about the 1st day of March, 1971 and continuously thereafter up to and including the 26th day of August, 1971, in the Western District of P nnsylvania and elsewhere, FRANCIS D. FERRI, a/k/a "RICK," JOSEPH LAVERICH, and KENNETH R. MATTHEWS, defendants herein, wilfully and knowingly did combine, conspire, confederate and agree together, with each other, and with Guy Elias Bertini, named as a co-conspirator but not as a defendant herein, and with divers other persons to the Grand Jury unknown to commit the following offense against the United States:

To maliciously damage by means and use of explosives, that is, dynamite and blasting caps, a 1971 Cadillac, Pennsylvania License Number M30292, belonging to Mr. Lynn P. Dunn, then being used in activities affecting interstate commerce.

In violation of Title 18, United States Code, Section 844(i).

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and co-conspirators performed the following overt acts:

1. On or about the 26th day of August, 1971, in the Western District of Pennsylvania, the defendant, KENNETH R. MATTHEWS arranged to meet Lynn P. Dunn at the Dunes Supper Club in Plum Boro, Pennsylvania.

2. On or about the 26th day of August, 1971, in the Western District of Pennsylvania, the defendants, FRANCIS D. FERRI, a/k/a "RICK," and JOSEPH LAVERICH, and co-conspirator Guy Elias Bertini constructed a bomb.

3. On or about the 26th day of August, 1971, in the Western District of Pennsylvania, defendant FRANCIS D. FERRI, a/k/a "RICK," and co-conspirator Guy Elias Bertini placed the bomb in the automobile belonging to Lynn P. Dunn, that is a 1971 Cadillac, Pennsylvania License Number M30292.

In violation of Title 18, United States Code, Section 371.

SECOND COUNT

The Grand Jury further charges:

That on or about the 26th day of August, 1971, in the Western District of Pennsylvania, FRANCIS D. FERRI, a/k/a "RICK," JOSEPH LAVERICH, and KENNETH R. MATTHEWS, defendants herein, and Guy Elias Bertini, not named herein as a defendant, did maliciously damage by means of explosives, that is dynamite and blasting caps, a 1971 Cadillac, pennsylvania License Number M30292, belonging to Mr. Lynn P. Dunn, then being used in activities affecting interstate commerce, that is, the automobile was being used by Lynn P. Dunn, doing business as the L.P.D. Equity Corporation and in his own name, to sell and promote the sale of franchises of the International Music Corporation; to operate and carry on the business of the area directorship of the International Music Corporation; to sell and promote the sale of the common stock of the New American Films Corporation; and to promote the busines sof the New American Films Corporation, resulting in injuries to the person of Guy Elias Bertini.

In violation of Title 18, United States Code, Sections 844(i) and 2.

NOTE: COUNTS THREE, FOUR, FIVE AND SIX NAME ONLY FERRI'S CO-DEFENDANTS AND, ACCORDINGLY, HAVE BEEN OMITTED.

SEVENTH COURT

The Grand Jury further charges:

That on or about the 26th day of August, 1971, in the Western District of Pennsylvania, FRANCIS D. FERRI,

a/k/a "RICK," JOSEPH LAVERICH, KENNETH R. MATTHEWS, defendants herein, and Guy Elias Bertini, not named herein as a defendant, wilfully and knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(d) and 5871, and Title 18, United States Code, Section 2.

EIGHTH COUNT

The Grand Jury further charges:

That on the 26th day of August, 1971, FRANCIS D. FERRI, a/k/a "RICK," JOSEPH LAVERICH, KENNETH R. MATTHEWS, defendants herein, and Guy Elias Bertini, not named herein as a defendant, wilfully and knowingly possessed a firearm, that is, a destructive device, made without the payment of a making tax as required by Section 5821, Title 26, United States Code, and made without the filing of a written application form with the Secretary of the Treasury as required by Section 5822, Title 26, United States Code.

In violation of Title 26, United States Code, Sections 5861(c) and 5871 and Title 18, United States Code, Section 2.

NINTH COUNT

The Grand Jury further charges:

That on or about the 26th day of August, 1971, in the

the Illinois Statute by providing the power in the established form of warrant itself, rather than in a separate enabling statute.[4]

As the Supreme Judicial Court of Massachusettes said in *Commonwealth* v. *Smith,* 348 N.E. 2d 101, 103 (Mass. 1976):

> "There is no general agreement in either holding or reasoning among the courts which have considered whether the search of any person present pursuant to a valid premises search warrant is a reasonable search under the Fourth Amendment."

Professor LaFave notes in his treatise *Search and Seizure (1978),* Vol. 2, § 4.9(c), that some courts have struck down searches which had been predicated upon the warrant powers cited above as being unconstitutional general searches, while other courts have upheld such searches under the statutory power conferred. LaFave believes that these apparently contradictory decisions can be reconciled upon closer examination of their facts. He maintains:

> The principle which emerges from these decisions is that it is not constitutionally permissible 'to search a person, not connected in any way with the place being searched, who merely happens to be on the premises and who is not mentioned or described in the affidavit of probable case upon which the warrant was issued'. Rather, 'the law requires that there be probable cause to believe that such persons are themselves participating in criminal activity' or, somewhat more precisely, that there be probable cause that evidence which might be concealed or destroyed is to be found upon the person searched.
> *Search and Seizure,* Vol. 2, § 4.9(c) at p. 144.

Appellee agrees from a survey of the decisions that the courts upholding searches pursuant to a provision such as Illinois'

[4] Del. Code Ann., Title 11, § 2310; Mass. Gen. Laws, Ann., ch. 276, §2A; N.H. Rev. Stat., Ann. §696-A:3.

§ 108-9 have required a connection between the persons to be searched and the place mentioned in the search warrant. However, such decisions have *not always required probable cause* to believe that such a connection exists or that the persons on the premises were involved in the criminal activity to which the warrant is directed.

The State of Illinois submits that under circumstances where these statutory powers are being employed by drug enforcement officers during search warrant raids on premises where hard narcotics are being sold, it is not necessary that there be full traditional probable cause to connect unknown persons on the premises to the persons or things to be searched by warrant, in order to constitutionally justify searches of the unnamed persons.

The Illinois Supreme Court has not as yet authoritatively construed Chapter 38, § 108-9. Illinois Appellate Court decisions which have construed the statute are of rather recent vintage and are all agreed that the statute does *not* authorize the search of any person found on any premises where a search warrant is being executed regardless of the circumstances. Illinois courts have been sensitive both to the constitutional danger of allowing the statute to transform otherwise valid specific warrants into general warrants and to the legislature's concern that objects sought by warrant will avoid discovery if persons on the premises are immunized from search in all but the most obvious cases of complicity.

In its opinion in the present case the Illinois Appellate Court, Second District, indicated that there were decided limits on the use of section 108-9(b), when it stated that it would not authorize a blanket search of persons or patrons found in a large retail or commercial establishment. The court pointed out in the present case that the search was conducted in a one-room bar where it was obvious from the complaint of the officer seeking the search warrant that heroin was being sold or

dispensed. The court reiterated that each case must be decided upon its own facts. Finding a reasonable application of the statute in this case, the court therefore held that section 108-9 was not unconstitutional in its application to the present facts. (Opinion at A., pp. 84-87)

Two years ago the Illinois Appellate Court, First District, in *People* v. *Dukes,* 363 N.E. 2d 62 (Ill. App. 1977), held that § 108-9 did not authorize the search of persons "on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 363 N.E. 2d at 64. The Court ruled that the statute could not be used to sanction automatic searches of any person who may happen upon the premises during execution of a warrant because such an interpretation would afford no protection to innocent strangers having no connection whatsoever with the premises. In that case the defendant had knocked on the door of an apartment being searched pursuant to warrant for gambling material. The same court most recently in *People* v. *Gloria Miller,* ____ N.E. 2d ____, (1st Dist. Ill. App., June 25, 1979) (see opinion attached hereto as Brief Appendix C) construed section 108-9 more explicitly in light of this Court's decisions in *Delaware* v. *Prouse,* ____ U.S. ____, 47 U.S.L.W. 4323, 99 S. Ct. 1391 (1979) and *Terry* v. *Ohio,* 392 U.S. 1 (1968). Applying the test of balancing the intrusion on an individuals Fourth Amendment interest with the promotion of a legitimate government interest, the appellate court construed the statutory language "reasonably detain to search" to require that the executing officer be able to express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for a purpose enumerated in § 108-9. The court also held that the power allowed by the statute to prevent destruction or concealment of items called for in the search warrant must be strictly limited to allow the search of only those persons on the

premises at the time the warrant was executed. In this case the search had already been completed when the outsider arrived. The *Miller* decision also followed *People* v. *Dukes* in requiring that the record show an indication that the officers knew the defendant had a sufficient connection with the premises to justify the search.

The Illinois Appellate Court, Third District, imposed similar limitations on § 108-9 in *People* v. *Boykin,* 382 N.E.2d 1369 (3rd Dist. Ill. App. 1978). There the court upheld the search of a person found in a residence during the execution of a search warrant, a person who had attempted to flee when the police entered the premises. The court specifically recognized

> "that section 108-9 cannot be read to authorize a routine search of anyone who happens to be on the premises regardless of circumstances. (*People* v. *Ybarra,* [citation omitted]; *People* v. *Dukes,* [citation omitted].) This section does authorize searches where it is shown that the person searched has some connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." 382 N.E. 2d at 1372.

It is important to note that this appellate panel cited the appellate court opinion in the present case as supporting the proposition that 108-9 must be read with certain limitations.

It is thus clear that the Brief Amicus Curiae of the State Public Defender of California in support of appellant is incorrect when, at page 4, it alleges that the Illinois court has authoritatively construed this statute to vest absolute discretion in searching officers to search any person present on premises described in a warrant regardless of the circumstances. Such a statement completely ignores not only the circumspect language of the decision below but also the very clear limitations imposed on the statute by other Illinois courts in recent months. Nevertheless, it is true that the Illinois opinions cited above

have not mentioned a requirement of probable cause to believe that a person on premises being searched under a warrant is concealing or destroying items sought in the warrant. Instead, the Illinois courts talk of the need for a "reasonable suspicion" or "reasonable belief" that such activity is occurring along with a reasonable belief that there is some connection between the person to be searched and the premises.

B. Judicial Authorities From Other Jurisdictions.

The decisions of other state courts interpreting similar statutory provisions have also refused to require full traditional probable cause in order to search a person present on, and connected with the premises listed in the warrant. The Court that has most frequently done so (contrary to the contention of the California amicus brief, supra) is the Georgia Court of Appeals. Recently in *Campbell* v. *State,* 228 S. E. 2d 309 (Ga. App. 1976), U.S. appeal dismissed, 429 U.S. 1083 (1977), the court held that where police armed with a warrant made a drug raid on a residence containing several persons not named in the warrant, there was a valid search of Campbell revealing a small plastic bottle containing cocaine. Discussing the very similar Georgia statutory provision, Code Ann. § 27-309, the court ruled that it allowed a very limited search of persons present on the premises at the time of the search, only to look for weapons or for the items particularly described in the warrant. During a pat-down search the police found a small plastic bottle in the defendant's right-hand pocket. "Whether or not that bottle could be removed from defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine." The court ruled that under the circumstances here, involving continuous useage, sale and storage of cocaine on the premises, that the police did have a reasonable belief that Campbell's bottle contained cocaine.

This decision is notable also because it is apparently the only other one on the subject that has ever given rise to a direct

appeal to this Court alleging an unconstitutional interpretation of its state's warrant powers statute. However, the appeal was dismissed on February 22, 1977 for want of jurisdiction and certiorari was then denied.[5]

The Supreme Court of Kansas has also upheld a statute identical to Illinois' Section 108-9, interpreting it to allow only reasonable detention and search of a person under the conditions specified. *State* v. *Loudermilk,* 494 P.2d 1174 (Kans. S. Ct. 1972). The Kansas court held that the search warrant issued to seize opium and related instrumentalities from a building where agents had seen opium users coming and going established probable cause to believe that opium was concealed either on the premises or on the persons of those present.

> Narcotics such as heroin, are easily concealed on a person and may readily be disposed of. Where, as in this case, probable cause to believe that a drug is kept or concealed on certain described premises is established to the satisfaction of a proper magistrate, the search of a person found on the premises in the execution of a search warrant is not only reasonable but necessary to secure effective enforcement of the Uniform Narcotic Drug Act.
> 494 P.2d at 1178.

The District of Columbia Court of Appeals in applying Section 23-524(g) of the D.C. Code of 1973 has in two decisions allowed the use of evidence obtained from the search of a person on premises which were examined pursuant to a warrant, on both occasions for gambling equipment and paraphernalia. *United States* v. *Graves,* 315 A.2d 559 (D.C. Ct. of

[5] The question presented in the jurisdictional statement in the *Campbell* appeal was "may a statute pertaining to execution of warrants be held constitutional if it is construed to authorize routine weapon searches in absence of factors required for pat down, and to authorize extension of search expressly permitted by warrant to visitors on described premises in the absence of probable cause to arrest or search such visitors?" 45 U.S.L.W. 3518.

Appeals 1974); *United States* v. *Miller,* 298 A.2d 34 (D.C. Ct. of Appeals 1971). In neither decision did the Court of Appeals require probable cause to believe that persons not named in the warrant but present on the searched premises were carrying objects sought in the warrant. In *Graves* the court noted that an informant had told officers just prior to the execution of the warrant that the people were inside that had the numbers slips on them; the court interpreted this as allowing the officers to reasonably believe that all the persons inside were involved in the gambling activity. The obviously reasonable limitations on the authority to search persons present on the premises being searched pursuant to a warrant were recognized. However, the court found that the search was not unreasonable under the Fourth Amendment and said "We do not believe on these facts that a suspect should be allowed to circumvent a warrant to search premises by the simple device of picking up the illegal object and holding it in his hand or by placing it in his sock. We know of no rule of law that requires such result." 315 A.2d at 561. The court noted there was no indication in the record that any of the people present had been in the searched delicatessen in order to shop.

In *Miller* the police sought to execute a warrant seeking gambling paraphernalia at an after hours bar. When the door was not opened at their request and running was heard inside, they forced the door and patted down approximately 20 persons present to determine if anyone had weapons or gambling paraphernalia. This search revealed a tinfoil packet of narcotics. The court held that the previous finding of probable cause exemplified in the warrant and the reactions of those in the bar when the search was announced combined to give the police "reasonable cause to believe that the occupants possessed, concealed and were about to remove or destroy the evidence for which they had a search warrant." "This belief

alone gave the officers sufficient ground to search the individuals present. *Nix* v. *United States, supra.*"[6] 298 A.2d at 36.

The Supreme Court of Florida held in the case of a gambling raid made pursuant to search warrant in *Samuel* v. *State,* 222 So.2d 3 (Fla. S. Ct. 1969) that the failure to name all the persons to be found on the premises did not make the warrant invalid to authorize the search of such persons. The warrant authorized the search of the building as well as "the person or all persons therein who shall be connected with or suspected of being connected with the operating or maintaining of said gaming or gambling games, devices, equipment and paraphernalia." The court held:

> We think that the section 22 organic requirement [similar to the Fourth Amendment] is satisfied when the judicial determination is made that there is probable cause to believe that the premises are being used for an illegal purpose such as gambling; and that it is entirely reasonable and proper to search persons found on such premises when there are reasonable grounds to suspect—that is believe—that such persons are engaged in or connected with the unlawful activities that are the subject matter of the search. (citations omitted)
> 222 So.2d at 5.

The Supreme Court of Washington made a similar statement in *City of Olympia* v. *Culp,* 240 P. 360, 361-62 (1925) qualifying the right to search persons found on the premises by the

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[6] In this Opinion, the court uses "good cause" and "reasonable cause" interchangeably but speaks of "probable cause" needed for issuance of the underlying warrant. Appellee submits that, in the context of search and seizure, reasonable cause is not as high a standard as probable cause. For example, paraphrasing the lesser standard for stops formulated by *Terry* v. *Ohio,* this Court's Opinion in *U.S.* v. *Brignoni-Ponce,* 422 U.S. at 881-3, uses interchangeably the words "reasonable belief," "reasonable grounds" and "reasonable suspicion." "Reasonable cause" also carries the same meaning as the Terry formulation.

requirement that officers have "reasonable cause to believe" that the persons have articles for which the search is instituted. The words probable cause are not used. The court also said

> Officers making a search of premises under a search warrant may lawfully detain all persons found therein until the search is concluded. Any other rule would frustrate the purposes of the search; the officers would be compelled to stand idly by while the articles for which the search was instituted were carried away.

See also, *VanHorn* v. *State,* 496 P.2d 121, 123 (Okl. Cr. App. 1972) agreeing with the above formulation; *Brown* v. *State,* 498 S.W.2d 343 (Tex. Ct. App. 1973); Drug Agents Guide to Search And Seizure, U.S. D.E.A. (1978) p. 79-80.

Although several state courts have construed their warrant forms or statutes similar to Illinois' Section 108-9 to require full probable cause for the search of unnamed persons on the premises when a warrant is being executed, e.g., *Commonwealth* v. *Smith, supra,* at least six of the decisions cited as being on point by appellant and by the California State Defender *do not* stand for this proposition.[7]

[7] *Willis* v. *State,* 177 S.E.2d 487 (Ga. App. 1970) is not inconsistent with the *Campbell* decision cited above since it upheld search of persons as being reasonable under the Georgia statute when they were gathered together in an apartment where drugs were in a container on a table within easy reach of all of them. The court makes no mention of probable cause in the decision and indeed describes the evidence for the personal search as being "skimpy and marginal [but] sufficient to support the search under the warrant charging a possessory offense and in accordance with Code Ann. Section 27-309 (b)." 177 S.E.2d at 490. Similarly, *State* v. *Cochran,* 217 S.E.2d 181 (Ga. App. 1975), which invalidated the search of individuals in an automobile leaving the premises about to be searched under a warrant "to search . . . the places and persons for the property specified" described as "illegal drugs and narcotics" in "automobiles, on persons and in two buildings located on the premises and curtilage known as the Sunshine Club," held that the search warrant was a general one. There was no limitation in the Cochran warrant, unlike

(footnote continued on next page)

The only authority from this Court which has been quoted as bearing directly upon the present issue is the decision in *United States* v. *DiRe,* 332 U.S. 581 (1948).[8] In that case the government claimed that the search of an automobile passenger

(footnote continued from preceding page)

the warrant in *Willis* and the Illinois statute, limiting it to persons who reasonably might be involved in the unlawful activity. Additionally, the court did not reach the issue of whether the warrant would have been valid as applied to the building housing the Sunshine Club under the circumstances.

The decision in *United States* v. *Branch,* 545 F.2d 177 (D.C. Cir. 1976) noted the difficulty of the present issue but never considered or decided it because the government never made the argument. In *United States* v. *Micheli,* 485 F.2d 425 (1st Cir. 1973) the court in dicta described the rules at either end of the premises search spectrum but did not discuss or confront the persons-on-premises search question presented in this case; the court did, however, allow the search of an unnamed person's briefcase when it had been left on the premises to be searched and the individual was connected with the premises. *McAllister* v. *State,* 306 N.E.2d 395 (Ind. App. 1974) was decided primarily on state procedural grounds involving the failure to incorporate the complaint for search warrant in the body of the warrant itself. The decision in *State* v. *Bradbury,* 243 A.2d 302 (N.H. S.Ct. 1968) is not inconsistent with the rulings of the Illinois courts. The decision invalidated a search of another student found in the dormitory room of an individual who was alleged in the warrant to be keeping marijuana. The court invalidated the search because there was no connection in any way between the individual searched and the place being searched, the indication was that the individual simply happened to be on the premises. The Illinois decisions cited above also require some connection with the premises shown either in the complaint for search warrant or in circumstances occurring at the time of the search.

[8] *Sibron* v. *New York,* 392 U.S. 40 (1968) did not decide any question presented by the instant appeal. Sibron's case was decided on the basis of no probable cause to arrest him and no legitimate suspicion that he was armed or was dealing in narcotics. Justice Harlan even stated that the eight-hour police surveillance had "pointed away from suspicion" of Sibron rather than adding to it. 392 U.S. at 74.

was justifiable as being incident to the right to search the vehicle on probable cause, without a warrant. Yet the government conceded that if an officer was armed with a search warrant for a residence only, he could not search all persons found in that residence. The Court naturally responded negatively to the suggestion that power not allowed to an officer under a warrant could be allowed in a situation of a search without a warrant. This Court did invalidate the thorough search of the passenger in the car where the informer had disclosed counterfeit government coupons, saying:

> We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.
> 332 U.S. at 587.

However, the Court did not decide whether, without Congressional authorization, any automobile is subject to search without warrant on reasonable cause to believe that it contained contraband. There seemed to be great importance ascribed to the fact that in DiRe's case there was no search of the automobile itself and indeed the automobile search doctrine appears to have been simply a pretext on which to search the passengers personally. Importantly, in discussing the doctrine of *Carroll* v. *United States,* 267 U.S. 132 (1925), the Court again held that permitting warrantless searches of automobiles was consistent with the Fourth Amendment primarily because it was in response to the dictates of an Act of Congress. The Court stated:

> Obviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the act was, therefore, unconstitutional. In view of the strong presumption of constitutionality due to an act of Congress, especially when it turns on what is "reasonable", the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are

> subject to search without warrant in the enforcement of all federal statutes.
> 332 U.S. at 585

In the instant case, the General Assembly of Illinois has decided that it is reasonable for officers executing a lawful search warrant to be able to detain and search persons on the premises under reasonable circumstances, especially in narcotics cases. The above dicta in *DiRe* is more supportive of the State's position in the present case than the dicta cited by appellant is destructive of that position.

C. The Important Governmental Interests In Controlling Narcotics and Encouraging Use of Warrants.

In addition to the dictates of common sense, there are, as mentioned above, a goodly number of courts and legislatures that have agreed with the Illinois General Assembly that the urgency of controlling the narcotics traffic and the every-day street realities of that nefarious business require giving officers executing search warrants the power to search unnamed persons on the premises, when there is a reasonable belief that they are connected with the unlawful activity and may be concealing or carrying away the contraband.

> It is well to remember that Congress itself has found that:
> "the illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. . . . Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances. . . . Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic."
> 21 U.S.C. §§ 801(2), (4) & (6).

The Second Circuit Court of Appeals, in upholding the stop of travelers in a narcotics smuggling case on the basis of a need to stop, has described the traffic in the following terms:

> "A significant portion of that need is supplied by the inherent odiousness and gravity of the offense, the societal costs of which, in terms of ruined and wasted lives, are staggering".
> *United States* v. *Oates*, 560 F.2d at 59.

The legislatures of several states (see footnote 3) and the courts of Kansas, the District of Columbia, and Washington cited above have all explicitly stated the need for officers searching under a warrant to have the power to search persons on the premises lest the warrant be made a mockery through the concealment of the objects sought. In *State* v. *DeSimone*, 288 A.2d 849 (N.J. S.Ct. 1972), Chief Justice Weintraub described this as being a power needed by the government to deal with crime.

Professor LaFave in discussing the Illinois statute in a law review article, "Search and Seizure: 'The Course Of True Law . . . Has Not . . . Run Smooth' " 1966, Ill.L.Rev., p. 266, 272 states:

> It is submitted that a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that *under some circumstances* a right to search occupants of the place named in the warrant is essential. The unresolved question is what connection must exist between the person and the premises and what other circumstances must be present to justify such action.

LaFave concludes that there must be probable cause to search a particular individual who is found at a place where a search warrant is about to be executed, but he admits that there is a problem where probable cause is lacking and yet persons on the premises may be concealing items sought in the warrant. In his treatise *Search and Seizure*, Vol. 2 at Section 4.9, p. 147, he asks "Are the police powerless to take any steps at all to foreclose the risk that the person may depart the premises with critical evidence concealed on his person?" Put differently, is there any practical step officers can take other than what the

I.B.I. agents did in the instant case? The only light LaFave sheds on the subject is contained in a quotation from *United States* v. *Festa*, 192 F. Supp. 160 (D. Mass. 1960). The court there speculated that it might be permissible for an officer executing a warrant aimed at an easily-concealed type of property to order a person on the premises to remain until the officer can be certain that the detainee is not engaged in removing the property specified in the warrant. See also *State* v. *Wise*, 284 A.2d 292, 294 (Del. S. Ct. 1971). LaFave finds this to be a very persuasive suggestion, especially in light of this Court's subsequent decision in *Terry* v. *Ohio*.

The State of Illinois suggests that the mere ability to detain a person on the premises to interrogate him and investigate the possibility that he may be concealing narcotics mentioned in the warrant is hardly ever sufficient to create probable cause to either excuse the detainee or to search his person. Even if a fairly prolonged detention on the spot did not constitute an illegal arrest (which this Court's decisions have given every reason to believe it does), nevertheless, an officer's ability to question or investigate experienced traffickers in hard drugs, who have undoubtedly learned to be discreet about their activities, will hardly ever yield definite information to give probable cause for believing that specific drugs are concealed on an individual person. The suggestion in *United States* v. *Festa* being entirely impractical in narcotics cases, if a hard and fast probable cause rule is imposed on the search of persons not named in the warrant, there can be no resolution of Professor LaFave's question. Many of the circumstances in which he sees an essential right to search occupants of the place named in the warrant will then not be recognized in the law.

The facts of the present case are illustrative of the problem. The officers executing the instant search warrant for the Aurora Tap had information (already accepted by an impartial issuing judge) that tinfoil packets had frequently been seen behind the

bar and on the person of the bartender Greg by the informant, a patron of the tavern. (A. 3) The complaint stated that the bartender was going to be selling packets of heroin at the bar on March 1, 1976. (A. 3) Contained within the informant's affidavit was the undeniable inference that some patrons of the small tavern were the intended purchasers of the heroin sought in the warrant and, perhaps, were even dealers themselves. The patrons in the tavern while the warrant was being executed were most likely people who frequented the neighborhood establishment; they were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and nortorious. (A. 2-3) The IBI agents clearly had a reasonable belief or suspicion that some or all of the patrons would have concealed on their persons some portion of the substances sought to be recovered in the warrant.[9] And yet under traditional probable cause standards, it might not be said that the police had probable cause to believe that any specific individual in the Aurora Tap was concealing heroin in tinfoil packets on his person, since no activity was observed by the police as they entered and no actions were taken by the patrons which would shed any light on their involvement during the initial minutes of the search warrant execution. If, contrary to the Illinois statute and the decisions of Illinois courts, the officers were unable to follow through on their reasonable belief that search objects were being concealed by some or all of the patrons and if they were not permitted to even pat down the patrons as part of the execution of the warrant, it is logical to expect that some or all of the patrons would have walked out of the tavern with some or all of the objects of the warrant in their possession. Nothing that the agents could have done, short of the greater intrusion of lengthy detention amounting to arrest or of detailed physical exam-

[9] The Return filed with this search warrant indicates that other patrons besides Ybarra were found to be concealing narcotics paraphernalia, i.e., hypodermic needles, and marijuana. (A. 7).

ination, would have informed them which of the patrons to search under a probable cause standard.

With no legal alternative for discovering objects of the search warrant concealed in patrons' clothing and given sanctuary there by a stiff probable cause standard independent of the warrant, the officers would undoubtedly have felt that their efforts and the warrant's purpose had been defeated to a great extent. The value of the search warrant would have seemed diminished, if not obliterated, in their eyes. As Chief Justice Weintraub said in the course of his decision in *State* v. *DeSimone, supra:*

> Needless to say there is no official arrogance when the officers place the facts before a magistrate for his view rather than search and seize upon their own assessment of the factual pattern when it accrued. Since it furthers the constitutional purpose to encourage applications to a magistrate [for a search warrant], we should take a view of the problem which will make that course feasible.
> 288 A. 2d at 851.

Unrealistic limitations on the execution of search warrants, if they endanger the officers' safety or obstruct and defeat the narcotics warrant's purpose, will definitely discourage applications to magistrates by drug enforcement officers for search warrants involving places where strangers may be found, which is to say, everyplace drugs are peddled.

D. Application of the Balancing Test Yields A Rule of Reasonableness Governing Personal Narcotics Searches Incident to Execution of Search Warrants:

To prevent such an unhappy turn of events and to encourage the use of judicially scrutinized and authorized search warrants for narcotics on premises where strangers will be found, this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant, when there is information that drug trafficking is

taking place at that location and the police have a *reasonable belief* that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing.

Applying the analysis used by this Court to permit searches on less than traditional probable cause in *Terry* v. *Ohio,* 392 U.S. 1, *Camara* v. *Municipal Court,* 387 U.S. 523 (1967), *United States* v. *Brignoni-Ponce,* 422 U.S. 873 (1975) and *Marshall* v. *Barlow's Inc.* 98 S. Ct. 1816 (1978), it is first noted that the governmental interests to be served by the ruling suggested are extremely strong. In line with the findings by Congress cited above in 21 U.S.C. § 801 and echoed in the enactments of every legislature in the nation, the Executive Branch of each government has an important interest in effectively controlling traffic in dangerous, hard drugs especially heroin. At the same time, the Judicial Branches of our governments have an interest in preserving the integrity and effectiveness of the search warrant, an interest which can be seen reflected in the many decisions over the past 20 years strengthening the warrant clause of the Fourth Amendment.

Balanced against these interests are the individual's concern with his privacy and his desire to avoid the indignities of personal searches. However, in the circumstance where an individual willingly enters a place where narcotics possession and/or sales is open and nortorious, there can be no realistic expectation that law enforcement authorities may not subject the individual to some inconvenience as a result of his choice. Appellee submits that only a minimal amount of inconvenience would result from the slight intrusion of a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs.

Clearly, the balance swings heavily toward the two governmental interests which would be served by a rule of reasonableness. Should the result required by balancing societal

interests here be different than it was in *Adams* v. *Williams*, 407 U.S. at 147, where this Court approved a quick search of a man sitting peacefully in his car at night based upon an informant's tip that the man was carrying narcotics and a pistol, information that may not have been sufficient for a search warrant? Should the result be different than it was in *United States* v. *Brignoni-Ponce*, 422 U.S. 873, where this Court approved limited investigative stops of unknown automobiles by roving border patrols in the border area, on reasonable suspicion that they might be carrying illegal aliens? Is it less reasonable in defining Fourth Amendment standards to accommodate the practicalities of government efforts to control the dangerous, debilitating narcotics traffic than to accommodate the realities of building code enforcement as did *Camara* v. *Municipal Court*, 387 U.S. 523?

Illinois submits that the twin governmental interests in the present situation are just as strong as those in the cited cases and that the inconvenience to or intrusion on bar patrons is no greater than the intrusions approved above. Therefore, the balancing test must yield the same result in the circumstances of the present narcotics search warrant case. A pat-down of patrons who are found on compact premises, are reasonably believed to have a connection with the premises or the criminal activity and are reasonably believed to have concealed in their clothes the objects of the narcotics search warrant should be allowed under the Fourth Amendment.

Ill. Rev. Stat., Ch. 38, § 108-9, as construed allows no broader searches of persons on premises which are being searched under warrant than is justified by the above balancing analysis. The statute was therefore constitutionally applied to

the facts of this case and Ybarra's conviction should be affirmed.[10]

[10] The same result can be reached in this appeal without removing the requirement of probable cause to search individual patrons on the premises, if the quantum of information and the degree of certainty required for probable cause in this situation is lessened, as in *Camara* v. *Municipal Court, supra.* Professor LaFave discusses the concept of a variable test for probable cause and presents approaches to that concept which could be used to find that the IBI agents in the present case *did* have probable cause to conduct a pat-down search of all patrons in the Aurora Tap for the objects specified in the search warrant. 1 LaFave, *Search and Seizure* (1978), § 3.2(a) and (e).

CONCLUSION

Whether this Court views the present appeal as one involving a frisk yielding probable cause to search for contraband or as a simple search incident to the execution of a narcotics warrant and pursuant to proper statutory authority, the search of appellant was proper under the Fourth Amendment. The statute attacked by appellant, if it had any effect on the outcome of his motion to suppress in light of *Terry* v. *Ohio,* was constitutionally applied by the court to the facts of his case. Appellant's conviction should be affirmed.

Respectfully submitted,

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BRIEF
APPENDIX A

BRIEF APPENDIX A

ASSAULTS ON DEA AGENTS

A Description and Analysis of Domestic Assault Incidents
(July, 1975 through December, 1976)

Prepared by:

Statistical and Data
Services Division
United States Dept. of Justice
Drug Enforcement Administration

INTRODUCTION

Purpose

This study was undertaken in an attempt to provide DEA management and Agent personnel with the most comprehensive data available regarding the conditions and circumstances surrounding assault incidents. The report's primary purpose is to provide descriptions and analyses of identified assaults which will prove beneficial in reducing both the risks involved and the number of assaults that occur during the course of investigative and related activity.

Sources

In order that all assaults would be accounted for, the scope of the data base employed for this report has been expanded over that of prior DEA assault studies. For this reason, no statistical comparisons or analyses of trends between this and preceding studies will be presented.

To insure total assault coverage, three sources have been utilized. The first of these is the "Discharge of Firearms" file maintained by the Office of Internal Security. This file contains accounts of all reported discharge of firearm incidents by Agents as well as several other assault incidents. The available listings were furnished to the appropriate Internal Security Field Offices and verified as accurate and complete. Second, the "Assaults on Agent" File maintained by the Investigative Records Section was searched. This file is a compilation of random assault incidents frequently unrelated to a specific investigation. Third, the Monthly Report of Assaults (DEA 346) submitted by each region was also utilized. Each individual region was then queried and asked to verify in writing regarding the actual number and corresponding case file listing of assault incidents reported on the DEA 346. It is believed that these sources encompass all domestic assaults occurring during the July 1, 1975—December 31, 1976 time

frame. Furthermore, to insure that the data contained in the above sources was not misleading, the corresponding case file in which an assault was identified was also studied.

Definition

As previously noted, the sources utilized provide an inclusive listing of assault incidents, ranging from assaults directly related to specific investigations to those related to various other aspects of enforcement activity. In an effort to provide a comprehensive insight into the nature of these occurrences, no identified assaults, with the exception of a limited number of incidents clearly beyond the scope of investigative activity, were omitted. Specific categories have been established to distinguish between the various types of assault situations.

With this in mind, a definition of what constituted an assault was formulated. Within the scope of this study, an assault is defined as the intentional or attempted use of physical force or weapon against a DEA Agent.[11] It should be noted, however, that in a number of situations a defendant injured or attempted to injure more than one Agent. For example, in one particular situation a defendant physically struck a State and Local Officer who was attempting to arrest him and then, moments later, struck another State and Local Officer. For purposes of this study, this is counted as one assault incident rather than two assaults.

* * *

[11] Unless otherwise specified, a DEA Agent also includes Task Force, other Federal and State and Local Officers.

I. STATISTICAL BREAKDOWNS

Total Assaults Over Time

A total of seventy-two domestic assault incidents occurred during the July 1, 1975, thru December 31, 1976, time frame. It is significant to note that of the seventy-two incidents, thirty-nine took place during the last six months of CY 1975 while only thirty-three occurred for all of CY 1976. If 2nd half CY figures are prorated to include the entire calendar year,[12] the resultant seventy-eight assaults would indicate a decrease of 58% in total assaults from CY 1975 to CY 1976.

* * *

Situation

By far, the most dangerous segment of an investigation is the arrest situation. Approximately 95% of all assaults occurred as an arrest was being made.[13] For purposes of this study, the arrest situation has been subdivided into two categories: (a) arrests in conjunction with a purchase of evidence and, (b) arrests in conjunction with the execution of warrants and similarly related circumstances. Both categories were equally divided (25 each) regarding the number of assault incidents.

Quite surprisingly, the number of robbery assaults during a purchase of evidence was extremely low (4). Furthermore, it should be noted that all four assaults occurred during the last six months of CY 75. No robbery assaults were recorded for the entire CY 1976.

[12]As previously mentioned, data base dissimilarities between this and prior DEA assault studies prohibit comparison of statistics.

[13] However, in the execution of warrants category of assaults almost half initially involved execution of search warrants or other searches, i.e. 10 or 12 of the 25 assault incidents studied. (This footnote added by the State of Illinois.)]

Assaults of all remaining classifications, with the possible exception of one category,[14] were minimal.

Situation (July 1, 1975-Dec 31, 1976	# of Assault Incidents
Arrest (execution of warrants and related circumstances)	25
Arrest (purchase of evidence)	25
Robbery (during purchase of evidence)	4
Surveillance	2
Compromise of Identity	2
Other (non-case related)	10
Other (case-related)	4
Total	72

Location of Assaults

Attempts to arrest defendants while they were seated in our behind the wheel of an auto precipitated the highest number of assault incidents. Invariably, in the majority of these cases, the defendant was attempting to escape and, in so doing, struck the officer with his vehicle.

Statistics reveal that assaults occurred in the following locations:

Automobile	— 27
Open Area	— 20
Private Residence	— 13
Other	— 10
Hotel/Motel	— 2
Total	72

Defendant Weapons

The firearm was the weapon used in nearly 38% of all assault incidents. Physical attacks and assaults involving the use of automobiles ranked second with identical numbers of assault incidents, eighteen each. A fourth category identifies

[14] See Section VII, (other non-case related assaults).

four incidents in which an unarmed defendant struggled for possession of the Agent's service revolver.

Weapon	# of Assault Incidents
Firearm	27a
Auto	18
Physical Attack	18
Struggle for Agent's Service Revolver	4
Knife	2
Other	3b
Total	72

a. One incident involved the use of both a firearm and knife.

b. Other weapons: (1) chemical substance; (2) bottle; (3) attache case.

* * *

Primary Drugs Removed

Of the fifty-eight assault incidents directly related to an ongoing investigation, heroin or cocaine was the primary drug removed or negotiated for in thirty-nine or 67% of the investigations. Although a review was initiated, no determination could be made as to whether or not drug type was a contributing factor in the assaults studied.

Primary Drug Removed/Negotiated	# of Cases	%
Heroin	21	36%
Cocaine	18	31%
Marihuana	5	9%
PCP	4	6%
Amphetamine	3	5%
LSD	3	5%
Methaqualone	1	2%
Quaaludes	1	2%
Methamphetamine	1	2%
Hashish	1	2%
Total	58	100%

II. ARRESTS (EXECUTION OF WARRANTS AND RELATED CIRCUMSTANCES)

Description

Location of Assault

Thirty-five percent of all assaults occurred as Agents were executing arrest/search warrants or engaged in similarly related circumstances. Of these, eighteen of the twenty-five assault attempts took place in either a private residence or automobile. A breakdown of the location of assaults is as follows:

Location	# of assaults	Percent
Private Residence	10	40%
Automobile	8	32%
Open Area	3	12%
Other	4	16%
Total	25	100%

Type of Assault

A strong correlation exists between the location of the assault attempt and the weapon utilized. Of the ten assaults occurring in a private residence, a firearm was the primary weapon employed in six incidents while, in two other occurrences, unarmed defendants struggled for possession of the Agents' service revolver. In each of the eight attempts to arrest a defendant in an auto, the auto itself was the instrument utilized as a weapon. As previously mentioned, the defendants were invariably attempting to escape and, in so doing, struck the officers with their vehicles. It should be noted that in four incidents the arresting officers did not set out to arrest a defendant while he was in his auto but, due to extenuating circumstances, were forced to deviate from the planned arrest situation. Of the seven assaults occurring in an open area and other locations,[15] only one incident involved the use of a firearm. The remaining six were physical attacks only.

* * *

[15] Other location includes: airport terminal, airport first aid room, airport restroom, carport.

APPENDIX OF CASES

Private Residence

1. An informant was to be utilized in an attempt to gain entry into an apartment and apprehend a defendant without violence. The informant accompanied by two SA's arrived and was admitted into the apartment. After entry, the defendant inquired as to the identities of the SA's. Before the informant could respond, the defendant stood and aimed a pistol at the SA's, ordering them and the informant to place their hands on their heads and remain motionless. Another person then blocked the door and was instructed by defendant to search everyone. This individual stepped toward the SA's and, in so doing, left the door unguarded. Both SA's, while talking in an attempt to pacify the defendant, inched toward door. The defendant observed this movement and cocked the pistol. Both SA's continued talking and managed to open the door and back out of the apartment. The door was then locked from the inside. Surveillance was contacted and instructed to assist. Both SA's knocked again and identified themselves. The defendant refused entry and advised he was going to dial 911. Both SA's encouraged him to do so. The defendant eventually unlocked the door and surveillance entered the apartment. The defendant ran into the kitchen and struggled violently before he was subdued and arrested. One SA sustained neck and knee injuries.
2. Five SA's arrived at a basement apartment to effect the arrest of a defendant. An SA knocked on the door which was opened by another person. The SA identified himself at which time this individual attempted to close the door and began yelling to alert person(s) within. The SA pulled the door open and ran to the rear of the apartment. Another SA attempted to push the subject aside to allow entrance of the other officers. The subject struggled with the SA and grabbed his service revolver, partially cocking the hammer. The other SA's then assisted in subduing and arresting the subject. Defendant was also arrested without further incident. No injuries.

3. Three SA's arrived at a residence to execute the arrest warrant. Two SA's approached the front door while one covered the rear. The defendant came to the front window at which time both SA's identified themselves and stated they wished to talk. After waiting approximately three minutes, the defendant invited one SA, whom he had previously negotiated with, inside. The door was shut on the other SA with defendant advising him to remain outside. Inside the residence, the SA displayed the arrest warrant. Defendant then turned and pushed the SA away. The SA drew his service revolver and advised the defendant to remain motionless. The defendant ran to the hallway and picked up a shotgun. The SA grabbed the barrel of the shotgun and began wrestling with the defendant. Both SA's then entered and assisted in subduing and arresting the defendant. No injuries.
4. As an individual entered the front doorway of the residence, both SA's identified themselves and attempted to question him concerning the location of defendant. The individual then attempted to push both SA's out the doorway. The SA's explained they only wished to question him concerning the whereabouts of defendant. The subject became more abusive and proceeded to shove and punch one of the SA's. The subject was then subdued and placed under arrest. Defendant, who was in the basement at time of the assault incident, was later arrested by surveillance. No injuries.
5. Prior intelligence indicated that a certain residence was being utilized as a storage house for heroin distribution. An SA arrived and knocked on the front door of the residence. (SA was accompanied by seven enforcement officers who concealed themselves from view). The defendant responded but denied knowing the SA, announcing the door would not be opened unless it was the police with a search warrant. The SA then identified himself, stated that he was in possession of a search warrant and requested that the defendant open the door. No reply was received. The SA again announced his presence and purpose. No reply was received, therefore, forced entry was initiated. At this time, the defendant raised the second floor window and fired one shot from a revolver. Two SA's then returned a total of ten shots at the window area. When firing ceased, a

State and Local officer observed movement at the front window area and, in an attempt to gain control of the downstairs area, thrust his gun through the window, discharging one round into the ceiling. At this time, the SA again ordered the defendant to open the door and lay on the floor. The defendant complied and was placed under arrest. No injuries.

6. Six SA's and one A.T.F. Agent, in possession of a Federal warrant, arrived at the defendant's apartment, knocked on the front door and announced their office and purpose. When no response was received, entry was forced. After entering, one SA shouted, "Federal Agents with a search warrant". As the SA proceeded down the hallway, he again announced his office and purpose. Arriving at the bedroom, the SA once again announced his office and proceeded to kick the bedroom door open. At this time he observed the defendant sitting up in a corner of the room with a gun aimed at the bedroom door. The SA then stepped back out of the doorway and ordered the defendant to drop the gun. Looking back into the room, he noticed that the defendant still had the gun pointed at the door. The SA then fired one round from the shotgun before stepping back from the door. The SA again ordered the defendant to drop his gun. Looking back into the room, he noticed that the defendant's hands and head were now concealed by a blanket. Believing that he was still in danger the SA fired one more round from the shotgun. Defendant then surrendered. Defendant sustained fatal gunshot wounds.

7. In possession of a Federal warrant, four SA's and three U.S. Marshalls surrounded the defendant's house, covering all exits. Two SA's and one U.S. Marshall knocked on the front door and identified themselves to the defendant who retreated to the second floor landing after refusing entry. The SA attempted entry but to no avail. Shortly thereafter, the defendant reappeared and fired two successive shots from a pistol. After returning fire, the officers again identified themselves, ordering defendant to surrender. After receiving assurance that no harm would come, the defendant threw his pistol down the stairs and surrendered. One SA received treatment for removal of glass in his left eye.

8. Two SA's and one State and Local officer arrived at the entrance of a trailer home. An SA announced on two separate occasions that he was a Federal Agent with a search warrant. When no reply was received, the State and Local officer kicked the front door open and was immediately confronted by the defendant with drawn automatic pistol. The State and Local officer ordered the defendant to drop his weapon. The defendant refused, further cocking the hammer of his pistol. The State and Local officer, believing that the defendant was about to shoot him, fired twice in succession, both rounds striking the defendant with fatal results.

9. In possession of a state search warrant, one SA and four State and Local officers knocked on an apartment door and announced their authority. Sounds emanated from the rear of the apartment suggesting that drugs were being destroyed. The SA used forced entry and proceeded to the bathroom where he observed the defendant flushing the toilet. The SA identified himself and ordered the defendant away from the toilet. The defendant was then removed to another part of the bathroom. Noticing that the toilet was filled with foil packages, the SA reached in and removed several packages. The defendant then struck him several times in the rib cage, knocking him against the wall. The SA stood up and pushed the defendant into a corner. The attacks occurred twice more. After the third attack, the SA struck the defendant once on the head with his pistol to eliminate the possibility of being hit again. No injuries.

10. In possession of an arrest warrant, two SA's entered an apartment to arrest one defendant (a total of five persons were in apartment during the arrest situation). Five SA's and four State and Local officers remained outside on surveillance. The SA's displayed their identification and arrest warrant to the defendant. At that point, two surveillance SA's gained entrance through the rear of the residence and started toward the basement area. All the occupants, including the defendant, then ran to the basement followed by surveillance officers. In the basement area, the occupants struggled with both SA's and attempted to gain possession of their service revolvers. Calm was eventually restored and the subjects were placed under arrest. No injuries.

Automobile

1. In the process of executing a state search warrant, three Task Force officers (one in full uniform) and two SA's arrived at residence. Shortly afterwards, a vehicle with three defendants inside pulled into driveway. Upon noticing the officers, defendants began to back out. The three Task Force officers approached, identified themselves and ordered vehicle to stop. Vehicle continued backing up at a high rate of speed. Upon reaching the street, vehicle began moving forward. Two of the Task Force officers took position in street directly in front of the vehicle. The vehicle travelled directly toward one officer knocking him to ground. He then fired his weapon in an attempt to halt the vehicle. Vehicle then proceeded forward toward the other officer, knocking him to the ground. He also fired at the vehicle. The third Task Force officer, thinking that both officers had been shot, then opened fire. Two additional officers, one SA and one ATF Agent, who at the time were approaching the residence to be searched, were informed of the fleeing vehicle and gave chase. All defendants were arrested without further incident. Both Task Force officers sustained minor injuries.

2. Subsequent to halting the defendant's vehicle, two SA's exited the OGV and approached both sides of the defendant's auto. SA approaching driver's side held service revolver in his left hand and badge in his right hand, both visible to the defendant, and announced his intent. Defendant then accelerated hard left and forward striking the SA causing his service revolver to accidentally discharge. Both SA's returned to the OGV, and along with two SA's in another OGV, gave chase. SA then observed defendant's vehicle suddenly come to a halt. One OGV was driven in front of and the other to the left of the defendant's auto. All SA's exited and approached the defendant who was then taken into custody. Defendant sustained gunshot wound as a result of the accidental discharge.

3. Prior information indicated that two defendants were involved in the trafficking of large quantities of heroin. Mobile surveillance was maintained on the defendant's vehicle until the order was given to effect their arrest. At this time, two OGV's pulled up to the front and rear of defendants' vehicle. Two SA's exited, identified themselves and advised both defendants they were under arrest. As SA opened passenger door, defendant placed the vehicle in gear. SA ran to front of vehicle, identified himself again and ordered vehicle to stop. Defendant drove toward both SA's who jumped back to avoid being struck. Vehicle proceeded past SA's and down an embankment into a wooded area, crashing into a tree stump. Defendant then ran into woods with SA in pursuit. SA again identified himself and advised defendant to exit the woods. A short time later, defendant returned and was advised that he was under arrest for assault. SA, noticing that defendant was unarmed, placed his service revolver in waistband. As he did so, defendant again attempted to flee but was tackled in the process. A brief struggle ensued, after which the arrest was effected. Other defendant was arrested without incident. No injuries.

4. After execution of search warrant, two SA's remained in the area in an attempt to apprehend defendant upon his arrival home. Defendant accompanied by another individual later drove past the residence. Both SA's followed until defendant exited his vehicle. SA's then identified themselves at which time defendant returned to auto and sped away, striking one SA with the vehicle. SA's returned to OGV and gave chase. After searching the area with negative results, SA's returned to defendant's residence advising subject's mother of his escape. After several phone calls, she contacted and persuaded her son to return home. Subject later arrived and surrendered. No injuries.

5. Information indicated that defendant would be delivering a quantity of heroin via auto. A decision was reached to effect the arrest at a designated intersection. Upon arrival of defendant, OGV's pulled up to the front, rear and right side of defendant's vehicle (all OGV's utilized flashing beacons). SA ran to passenger door, identified himself, ordering defendant to freeze. SA, noticing that defendant had moved his hands toward wheel and gear shift, attempted to open passenger door with negative results. Defendant placed vehicle in reverse and backed into one OGV. Defendant then accelerated toward one SA. At this time, SA, who was attempting passenger door entry, discharged three rounds into the rear of defendant's vehicle. Defendant fled, pursued by five OGV's. Defendant later

lost control of vehicle, which spun out next to a junkyard. Upon arrival, the SA's observed defendant's vehicle stopped with driver's door open. A search was initiated with defendant found hiding under an abandoned auto. He was then placed under arrest. No injuries.

6. after observing one of two defendants placing suitcases in trunk of auto, surveillance SA's approached. Noticing the arrival of both OGV's, defendant entered auto and attempted to depart. Both OGV's blocked exit at which time defendant attempted to go between the OGV's. Failing, he backed up. As surveillance officers approached on foot, defendant accelerated toward one officer. With weapons drawn, surveillance ordered defendant to stop. He complied only after one SA had fallen across hood to avoid being run over. Other defendant was arrested without further incident.

7. After receiving information that defendant was soliciting funds for purchase of marihuana and amphetamines, one SA and one Task Force officer proceeded to parking lot to await defendant's arrival. Upon his arrival, OGV was driven in front of defendant's vehicle and both officers exited. Task Force officer approached driver's side with ID in hand. Defendant accelerated causing Task Force officer to jump back. Both officers pursued. Defendant attempted to ram OGV three or four times during chase. After another near collision, Task Force officer fired one round into right side of vehicle bringing it to a stop. Defendant was then arrested. No injuries.

8. Two teams of SA's assumed surveillance in a field adjacent to a river. SA's were concealed between and under various abandoned vehicles. Intent was to apprehend two defendants, one of whom was a swimmer expected to exit river with six kilograms of cocaine. Defendant, to whom cocaine was to be delivered, entered field and parked at the foot of the river. Shortly after movements were observed in the water, defendant started his car and proceeded toward vehicle occupied by informant and undercover SA. After parking, defendant exited and stood next to informant's vehicle. At this time, two SA's identified themselves in both Spanish and English and shouted for defendant to freeze. Defendant ran to his vehicle, entered the driver's side and was observed to be reaching under the front seat while,

at the same time, accelerating vehicle in the direction of one SA who was approaching from the front. Believing that defendant was reaching for a weapon and about to run over SA, the arresting SA's opened fire. Defendant escaped immediate area but was pursued and arrested by surveillance without further incident. At the time of arrest, a pistol was seized from the purse of defendant's companion. No injuries. It should be noted that due to radio malfunction, contact between surveillance teams and observation post was lost.

Open Area

1. Information was received from a wholesaler indicating that a half shipment of quaaludes would be diverted. After meeting with company officials, SA's substituted a package containing 100 quaaludes from the original 9,600 shipment. Three defendants were initially arrested and agreed to cooperate. Plans were then formulated to effect the arrest of the final two defendants, As arranged, an undercover SA and informant inside CI's vehicle followed the two defendants to a designated location. (Substitute package was located in trunk of CI's vehicle). Both defendants exited their vehicles and proceeded to informant's vehicle. The informant then exited his vehicle as planned. All three individuals engaged in conversation near the rear of CI's vehicle. After a few minutes, trunk of CI's vehicle was lifted (arrest signal) but was quickly lowered as a surveillance vehicle approached. A short time later, trunk was lifted again. Undercover SA and surveillance officers then exited their vehicles. After identifying himself, undercover SA attempted to arrest one defendant, who resisted and tried to escape. SA, while struggling with defendant on the ground, was struck in the face. After defendant was subdued, a search revealed a loaded gun. Other defendant was arrested without a struggle. No injuries.

2. Three SA's observed two defendants standing on street corner. Defendants were to be arrested in connection with cocaine delivery. The SA's approached and announced their office. One defendant was then placed under arrest. At that time, the other defendant made a remark about law enforcement officials. SA then turned toward this individual and was physically struck by him. Subject was then subdued with necessary force and placed under arrest. No injuries.

3. In possession of an arrest warrant, two SA's observed the defendant enter a vehicle on the passenger side. The OGV was then driven in front of defendant's vehicle. Both SA's exited, identified themselves and ordered defendant to step out and place his hands on the roof of the vehicle. After ignoring at least three repeated demands, the defendant finally exited and, with gun in hand, moved in a crouched position to the rear of the vehicle. Both SA's approached and, as one SA neared the rear of the vehicle, the defendant aimed his gun at him. (Subsequent investigation indicated that defendant's weapon misfired due to faulty ammunition). The SA responded by firing three shots at defendant. Stepping to the rear of the vehicle, the SA observed the defendant crouching with the pistol in hand facing the other SA. The SA then fired a fourth shot, wounding the defendant. The defendant began struggling at which time the SA struck him on the head with his pistol which discharged. Both SA's then subdued the defendant.

Airport Terminal

1. During inspection of arriving flights, two SA's approached a defendant, identified themselves and requested defendant's identification. SA's then asked defendant to accompany them to another location for further questioning. At this time, defendant struck both SA's in chest with forearm and clenched fist. Pursued by four SA's, defendant exited passenger tunnel and entered parking lot. During chase, SA's observed defendant place his hand in jacket pocket. Thinking that defendant was attempting to draw a weapon, two SA's withdrew their service revolvers and commanded him to stop. Defendant turned and yelled "don't shoot". He then removed the heroin from his pocket and tossed it over the Fence. Defendant was arrested without further incident. No injuries.

Airport First Aid Room

1. Two SA's, on routine inspection of arriving flights, identified themselves to defendant and asked him to accompany them to first aid room. After entering, defendant attempted to flush the heroin down the sink. A brief struggle ensued. Defendant was then subdued and placed under arrest. No injuries.

Airport Restroom

1. SA, on inspection of arriving flights, followed defendant to airport terminal entrance. SA identified himself and asked defendant to accompany him to airport restroom. After entering, defendant ran to restroom stall and attempted to flush heroin packet down the toilet. SA followed and removed packet. After struggling, SA then forcibly removed defendant from restroom. No injuries.

Carport

1. In possession of a search warrant, two teams of Task Force officers approached the front and rear of a private residence. Other officers remained in the immediate vicinity. After observing four defendants inside a pickup truck parked in the carport of the residence, two Task Force officers approached, identified themselves and ordered the defendants to exit the vehicle. After exiting, one defendant physically struck one of the officers on the jaw. The officer retaliated by striking the defendant in the mouth. During the incident, another defendant attempted to assault the officer but was restrained by a third Task Force officer who had entered the carport. Two additional Task Force officers then approached the carport and, after seeing that the situation was under control, proceeded to secure the residence. Returning to the carport, one of the officers approached the defendant, who had assaulted the arresting officer, identified himself and stated that he was in possession of a search warrant. The defendant then struck the officer with his fist. A struggle ensued between the defendants and the arresting officers. All defendants were eventually handcuffed and arrested. One Task Force officer was hospitalized and treated for a fractured nose, eye and lip bruises.

BRIEF
APPENDIX B

BRIEF APPENDIX B

DRUG AGENTS GUIDE
TO
SEARCH & SEIZURE

Written by

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U.S. Department of Justice

1978

WARNING

The rules contained in this Guide are based upon the Fourth Amendment to the United States Constitution, as interpreted by the Supreme Court and by a majority of lower federal courts. A few of the rules have been interpreted or applied differently by a number of lower courts, both state and federal. Moreover, many states impose tougher restrictions on police conduct than the federal Constitution does. It is imperative, therefore, that you

CONSULT YOUR PROSECUTOR OR LEGAL ADVISOR BEFORE APPLYING THE RULES CONTAINED IN THIS GUIDE! [(ii)]

DRUG AGENTS GUIDE TO SEARCH & SEIZURE

by Harry L. Myers
Office of Chief Counsel
Drug Enforcement Administration

I. Introduction

It is extremely difficult today to obtain a good working knowledge of search and seizure law. First, the sheer number of cases being decided on the subject makes it impractical to stay current with every small change or interpretation handed down by the courts. The volume of cases decided, almost on a daily basis, is overwhelming. Second, many of the reported decisions conflict with one another. Trying to extract rules from these decisions, which can be confidently applied in future investigations, is always frustrating and frequently impossible. Third, there are countless factual situations involving Fourth Amendment protections which have never been resolved by the courts. How can an agent be expected to cope with so many unknowns? Finally, assuming the conflicting decisions could be resolved and a rule could be found for every case, how could a law enforcement officer learn such a large body of law?

In spite of these hurdles, drug enforcement officers must develop a practical knowledge of search and seizure law. Without it, they run the risk of violating constitutional rights, they jeopardize the successful prosecution of their cases, and they expose themselves to civil lawsuits for damages.

The solution to this dilemma—the absolute need to learn the law, on the one hand, and the many hurdles to learning, on the other—lies in a two step approach: [-6-]

(i) LEARNING THE CLEAR-CUT RULES, and

(ii) DEVELOPING A LOGICAL SYSTEM TO APPLY THE RULES TO ANY PROBLEM. [-7-]

A knowledge of the basic rules is essential. These core principles are applicable to every case, they remain unchanged for long periods of time, and they are recognized and accepted by virtually every court. Learning these clear-cut rules is the first step to learning the law.

Developing a thorough, systematic approach for applying these rules to most factual situations is equally essential. Analyzing a problem, identifying the legal questions, and selecting the correct legal rules, should not be a "hit or miss" proposition. A logical approach is needed: one that insures a more thorough analysis, prevents jumping to "gut" conclusions, and makes complex situations easier to solve by breaking them down into smaller, simpler, problems. Cromberg, et al., *On Solving Legal Problems,* 27 Journal of Legal Education 165 (1975).

These two steps offer the best way to develop a working knowledge of search and seizure law in the least amount of time. An officer cannot memorize the rule of law for every possible case he will encounter. Learning the basic rules and knowing how to apply them offers a way to cope with the endless variations that must be faced. [-7-]

* * *

4. Search Can't Exceed Warrant's Scope

A search warrant restricts the search to only those places, and for only those objects, described in the warrant. The search cannot exceed this scope.

a. *Areas to be Searched* [-78-]

* * *

3) *Persons on Premises*

A search warrant for premises does not automatically authorize a *full* search of persons either found on the premises or who come onto the premises while the search is in progress (*U.S.* v. *Di Re.* 68 S.Ct. 222, 1948; *U.S.* v. *Festa,* 192 F. Supp.

160, DC Mass. 1960; *Smith* v. *State,* 289 So 2d 816, Ala. 1974; *State* v. *Bradbury,* 243 A.2d 302, N.H. 1968; *State* v. *Carufel,* 263 A.2d 686, R.I. 1970; *State* v. *Fox,* 168 N.W. 2d 260, Minn. 1969; *State* v. *Massie,* 120 S.E. 514, W.Va. 1923; *People* v. *Smith,* 234 N.E. 2d 460, N.Y. 1967; *Purkay* v. *Maby,* 193 P. 79, Idaho, 1920).

If, on the other hand, the persons on the premises or coming onto the premises are connected to the illegal activity, and could be concealing objects named in the warrant, they can be searched for those objects (See *U.S.* v. *Peep,* 490 F.2d 903, 8 Cir. 1974; *U.S.* v. *Micheli,* 487 F.2d 429, 1 Cir. 1973; *U.S.* v. *Johnson,* 475 F.2d 977, DC Cir. 1973).

It is not clear whether you need probable cause or simply a reasonable suspicion to believe persons on premises are concealing items named in the warrant, but you must be able to articulate some facts which make it likely.

Example. You have probable cause to believe Charlie is distributing drugs to a steady stream of buyers visiting his house trailer. You get a valid warrant to search the trailer and Charlie for drugs. While executing the warrant you find marihuana, scales, plastic baggies, rolled marihuana cigarettes, methamphetamines and other drug paraphernalia. [-79-]

The phone rings. You answer it. A man asks for Charlie. You say "He's busy, but come on over." Within a few minutes a man knocks and you let him in. He is carrying a brown paper bag. Does the warrant permit you to conduct a full search of this visitor?

Yes. Although a search warrant for premises does not automatically extend to persons on the premises, you have sufficient facts and circumstances to believe the visitor is there either to buy from or to supply Charlie with drugs, and that he may be concealing items named in the warrant. Therefore, he can be searched (See *Earnest* v. *State,* 314 So. 2d 796, Fla App. 1975).

Example. You have probable cause to believe that Milt is involved in drug trafficking and that he stores large quantities of heroin at his barber shop. You have no indication that Milt is selling to shop customers. You obtain a warrant to search Milt and his shop. You execute the warrant at noon on a business day. While you are searching, a clean-cut male, dressed in a three-piece suit comes to the shop and you let him in. One of the barbers tells him the shop is closed and to come back tomorrow. You know nothing about the man. May you subject him to a full search under the warrant? [-80-]

No. There is no evidence that the shop is retailing drugs to a steady stream of customers. You have no information to link the visitor to criminal activity. The man is likely to be an innocent customer who knows nothing of Milt's activities. Therefore, the warrant to search the shop does not extend to him (See *Smith* v. *State,* 227 S.E. 2d 911 Ga. App. 1976; *Smith* v. *State,* 289 S.2d 816, Ala. 1974; *U.S.* v. *Branch,* 545 F.2d 177, DC Cir. 1976). [-81-]

* * *

5. Protective Measures

A search warrant is an order issued by a judicial officer in the name of the government, commanding an officer to conduct a search for specified objects.

Persons do not have the right to forcibly resist the execution of a search warrant, even though the warrant may later be held to be invalid (*U.S.* v. *Ferrone,* 438 F.2d 381, 3 Cir. cert. den., 91 S.Ct. 2188, 1971).

a. **Anything Necessary and Proper.** Subject to department restrictions (for example, restrictions on the offensive use of firearms) and to restrictions imposed by statute, you may do whatever is necessary and proper under the circumstances to execute the warrant (*Clifton* v. *Cox,* 549 F.2d 722, 9 Cir. 1977).

b. **Securing Persons.** You can restrict the movement of persons on the premises both to protect yourself and to prevent interference (*U.S.* v. *McKethan,* 247 F. Supp. 324, D.DC. 1965) [-83-]

You *may* be justified in frisking persons found on the premises for your protection while executing the search. See the "Stop & Frisk" section of this outline for a discussion of the right to frisk.

Remember: Your right to secure the persons found on the premises does not automatically include the right to conduct a *full* search of their person.

c. **Securing Weapons.** You have the right to locate and take temporary possession of any weapons in the area which you reasonably believe could be used against you (*U.S.* v. *Chapman,* 549 F.2d 1075, 6 Cir. 1977; *U.S.* v. *Bowdach,* 414 F. Supp. 1346, SD Fla. 1976; *U.S.* v. *Gilbert,* 378 F.Supp. 82, WD So. Dak. 1974; *U.S.* v. *James,* 408 F. Supp. 527, SD Miss. 1973).

Of course, once the search is over and the danger has passed, continued possession of the weapon cannot be justified as a safety measure. Unless some other justification exists for retaining the weapon it must be returned to the owner (See the "Plain View" section of this outline). [-84-]

* * *

BRIEF

APPENDIX C

BRIEF APPENDIX C

THE PEOPLE OF THE STATE OF ILLINOIS, ***Plaintiff-Appellee,*** **vs.** **GLORIA MILLER,** ***Defendant-Appellant.***	Appeal From The Circuit Court of Cook County. — Honorable **WARREN D. WOLFSON,** Judge Presiding.

Mr. JUSTICE O'CONNOR delivered the opinion of the court:

Defendant, Gloria Miller, was indicted on two counts of possession of a controlled substance. After a bench trial, defendant was found guilty as charged. The circuit court of Cook County sentenced her to concurrent terms of imprisonment of 4 to 6 years on count one and 1 to 3 years, plus a $1,000 fine, on count two. Defendant appeals the judgments of conviction, contending only that the trial court erred in denying her motion to quash her arrest and suppress physical evidence.

Officer Cleophus Johnson was called as a witness on the motion to suppress. Johnson testified that on April 25, 1975, at about 12:45 a.m., his partner, Officer Nathan Gibson, eight to ten other officers and himself had occasion to execute a search warrant. The warrant stated that there was probable cause to believe that a quantity of heroin was located upon the person of Carolyn Harris and in her third floor apartment in Chicago. The officers were in plain clothes and forced their way through the front door by using crowbars and sledge hammers. They searched the apartment for about one to one and one-half hours, discovering a quantity of narcotics and three handguns. As a result, James and Carolyn Harris were arrested for possession of narcotics.

According to Johnson, about an hour and one-half after the officers' entry, while they were concluding their search in the living room, he heard a knock at the rear door. When he first saw the defendant, she and a male companion (Earl Charles) had entered through the back door and were walking to the living room. Johnson testified that he did not draw his gun and did not see Gibson's weapon drawn. Nor did the officers order defendant or her companion to enter the apartment.

Johnson further testified that the officers asked Charles who he was, why he was there and whether he lived there. His response, if any, is not of record. Approximately two to three minutes after defendant and Charles entered the apartment, the officers searched Charles and recovered a weapon. Johnson testified that at the time of this search defendant was not free to leave. A few minutes later Johnson noticed a large bulge in defendant's pants. Upon questioning, defendant replied that it was a sanitary napkin. Officer Johnson told her, "it wouldn't stick out like that" and said she would have to be handcuffed until she was searched by a police matron. According to Johnson, Charles whispered to defendant that she "might as well give it to him." At this point defendant proceeded to the bathroom accompanied by the officers. She unzipped her pants and removed two clear plastic bags containing a brown narcotic powder. Defendant was arrested and transported to the police station, where she produced more narcotics from her bra.

On cross-examination, Johnson testified that the rear door of the apartment leads to an enclosed porch. The majority of the officers involved in the search had already left the premises when defendant arrived. He indicated that the bulge in defendant's pants was pointed and could have been another weapon. When defendant was walking to the bathroom, Johnson remained close behind her.

On redirect-examination, Johnson explained that when defendant and Charles knocked on the door, the officers had already searched every room in the apartment, but were making a final search of the living room. Officer Johnson also testified concerning his safety:

"Q You said when you saw the bulge you believed in your mind that it was a weapon, is that correct?

"A Yes.

"Q You didn't have a weapon drawn?

"A No.

"Q Therefore, Officer, were you in fear for your safety at this point?

"A Not at this point.

* * *

"Q At anytime that evening before she gave you some objects from her pants were you in fear of your safety because you thought she had a weapon in her pants?

"A No.

* * *

"Q When did you feel that your safety was in danger?

"A If I turned my back she would have a chance to go in her pants, but as long as I was facing her, I didn't feel—

* * *

"Q Did you ever turn your back on Gloria Miller?

"A No."

Defendant was not handcuffed until she was arrested. On recross-examination, Johnson explained that if defendant made a move, he could keep physical control.

Johnson's partner, Officer Nathan Gibson, also testified at the suppression hearing. Gibson stated that at about 2 a.m., he and Johnson first encountered defendant and Charles in the kitchen. He observed that the door between the kitchen and the enclosed porch was open. There was a wooden door from the porch to the outside which had a lock.

Gibson was the first officer to confront defendant and he had his weapon drawn. He testified that Johnson was behind him and did not have his weapon drawn. Gibson informed the couple that a "flash raid" was being conducted. Charles said he had come to see Carolyn Harris. According to Gibson, he did not point his weapon at the couple and neither officer directed them to enter the apartment. The officers frisked Charles and recovered the handgun. Gibson subsequently noticed a large bulge shaped like a half moon in the crotch of defendant's pants. When Gibson questioned defendant about the bulge, she said it was contraband. Charles told her to give the contraband to the officers. She surrendered the contraband, was arrested and advised of her rights. At the station she informed the police she had more contraband in her bra.

Defendant did not make any movements or gestures to indicate to the officer that he had reason to fear for his safety. Nonetheless, Gibson was cautious because of the handguns previously recovered and because defendant had not been searched. He did not turn his back on defendant. Gibson also stated that from the moment defendant entered the apartment she was not free to leave.

Officer Gibson further testified as to his frame of mind upon encountering defendant and Charles:

> "* * * [W]e were conducting this raid, and when I met Gloria Miller and Earl Charles in the kitchen in the area, I did not know why they were there. And when they informed me they wanted to see Carolyn Harris, whom we had a search warrant for, and her premises, I felt that it was necessary to conduct a protective search of the male."

Gibson stated that it was his intention to conduct an investigatory "field interview" of the couple upon their entry.

James Harris testified for the defendant that on April 25, 1975, he lived with his wife and two small children in the third floor apartment named in the warrant. He had gone to bed at about 4 p.m. and was awakened between 9 and 10 p.m. by policemen breaking down the front door. The police conducted a search of the apartment and ultimately arrested James and Carolyn Harris.

According to Harris, between 3 and 3:30 a.m. he was sitting handcuffed in the living room with his wife, two children, and Officers Kelly, Johnson and Gibson. They were waiting for Carolyn Harris' mother to arrive to pick up the children before being transported to jail. All the other officers had left the premises; the search had been completed 30 to 45 minutes previously and the officers were listening to his stereo.

At this time and under these circumstances, there was a knock at the back door of the apartment. Harris testified that this door led outside of the apartment and was padlocked and secured from the inside by an iron bar, commonly called a police lock. Inside this door was an enclosed porch. French doors separated the porch from the kitchen. Harris further testified that Officers Johnson and Gibson went to answer the door. It took them two to three minutes to operate the police lock and open the door. Both officers were in the enclosed porch area. Gibson opened the door, directed defendant and Charles inside with a waving motion of his left hand, and with his right hand pointed his service revolver out the door.

The trial court considered all of the above evidence and made certain findings of fact. Initially, the court found that:

> "* * * [T]o place the testimony of Officer Gibson alongside the testimony of Officer Johnson, the only reasonable conclusion would be that they are not credible

witnesses, that the contradictions in their testimony, I think, are unexplainable. I won't go down the entire list of them."

The court found Harris' testimony credible and accepted it for the purpose of its opinion.

After resolving credibility, the trial court stated additional findings which follow in pertinent part:

"There was a knock on the door in the early morning hours of April 25th of 1975. The police were on the premises, had conducted a search pursuant to a lawful warrant, * * *.

"I find the police invited, and I use the term invited in much the same way the Court use [sic] directed in Pugh, invited Gloria Miller and Earl Charles, her companion, into the premises; one officer having his gun drawn at least. And I find further that it was not a voluntary entry onto the premises.

"I further find that the police were on the premises for a proper purpose, that they had at that point already found contraband during a lawful search and were in the process of * * * taking the Harrises into custody.

"I find that while the search itself had been completed, the police were still in the place where they had a right to be and that they were waiting for somebody in the family to arrive to care for the children of Mr. and Mrs. Harris.

"I further find that three handguns had been found in the apartment before Gloria Miller entered the premises."

Under these facts, the trial court ruled that Ill. Rev. Stat. 1975, ch. 38, par. 108-9, and *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, enabled the officers to legally require defendant and Charles to enter the premises. Moreover, the court believed the officers had a right to frisk them for weapons.

The sole issue on appeal is whether, pursuant to Ill. Rev. Stat. 1975, ch. 38, par. 108-9 and decisional law, the police may order a citizen not on the premises nor named in the search warrant to enter and subject themselves to a search.

For purposes of this opinion we accept, in substance, the trial court's findings of fact. However, we find the officers had no legal right to force defendant onto the premises and search her. Accordingly, we reverse and remand.

Preliminary to determining whether the search was valid, the State does not contend that defendant acted voluntarily in turning over the contraband stored in her pants. Thus, they have conceded that presenting defendant with the choice of cooperation or handcuffing and subsequent search by a police matron constituted a search under the fourth amendment. (U.S. Const., amend. IV.)

Ill. Rev. Stat. 1975, ch. 38, par. 108-9 provides:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

(a) To protect himself from attack, or

(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The thrust of the statute is that by virtue of the authority to search the premises, it is sometimes permissible to search persons on those premises. The statute does not expressly state that the officer must have probable cause to believe one on the premises possesses a weapon or the items described in the warrant. However, the language "reasonably detain to search" suggests that the officer must be prepared to show some reason to suspect that the person on the premises might attack him or attempt to dispose of or conceal items named in the search warrant. (*People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363

N.E.2d 62.) An additional requirement, not apparent from the face of the statute but implied by decisional law, is some showing that the person searched have some connection with the premises. *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 753, 385 N.E.2d 171; *People* v. *Dukes.*

In applying this statute to the case at bar, we must also consider the relative timing of the apartment search and defendant's non-voluntary entry. The Committee Comments to section 108-9 recognize that the need for a search usually arises "* * * when the officer first arrives at the place where the goods are to be seized." Further language is also instructive:

> "* * * The need for this power arises most often in the narcotics cases where disposition is most easily effected.
>
> * * *
>
> "* * * Furthermore, if a judge decides there is probable cause for issuing the warrant in the first place, then this power given to the officer which is parasitic to the warrant should not be considered excessive in the hands of the executing officer." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

However, to ensure that the power given the executing officer is not excessive, the timing of a search pursuant to the statute must be strictly construed. (*People* v. *One 1968 Cadillac Automobile* (1972), 4 Ill. App. 3d 780, 281 N.E.2d 776.)

> "* * * The statute does not grant to police the power to search someone at their leisure. The need for the search is immediate, and it must be conducted at the earliest opportune moment after the danger presents itself. * * *"
>
> 4 Ill. App. 3d, at 787, 281 N.E.2d, at 781.

Moreover, the language "may reasonably detain to search" must be strictly construed in light of the teaching of the United States Supreme Court in *Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323, and *Terry* v. *Ohio* (1968), 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889. *Terry* and *Prouse* indicate that a

detention is a "seizure" within the meaning of the fourth amendment even when the purpose of the stop is limited and the resulting detention is quite brief. Accordingly, when defendant and Charles were "invited" into the apartment at gunpoint and made a non-voluntary entry, their detention constituted a seizure within the meaning of the fourth amendment. Officers Johnson and Gibson both testified that defendant was not free to leave.

Classifying defendant's detention as a "seizure" does not end our inquiry, however. The fourth amendment only prohibits unreasonable searches and seizures. The reasonableness, and hence the permissibility, of a particular law enforcement practice is judged by balancing the intrusion on an individual's fourth amendment interests versus promotion of a legitimate government interest. (*Delaware* v. *Prouse* (March 27, 1979), 47 U.S.L.W. 4323.) In accordance with the teaching of *Terry* and *Prouse,* we construe the language "reasonably detain to search" to require that the executing officer can express at least an articulable and reasonable suspicion that either a search or a detention (or both) is for an enumerated purpose of section 108-9. By this requirement the courts will be provided with a record containing specific articulable facts which, together with rational inferences from those facts, will indicate whether either of the twin functions of section 108-9 is met and, accordingly, whether either the search or the seizure (or both) is reasonable. *Delaware* v. *Prouse; Terry* v. *Ohio.*

Applying these principles to the facts of the instant case, we conclude that the seizure and search of defendant were unreasonable and did not comport with the requirements of section 108-9. Initially, strict compliance with the statute only enables detention and search of any person on the premises at the time the warrant is executed. The trial court found that the search had been completed. This finding is supported by Harris' testimony that the search ended 30 to 45 minutes prior to defendant's arrival. Nonetheless, the trial court believed that

since the police were still on the premises for the lawful purpose of taking the Harrises into custody, the statute was satisfied. Such an expansive reading of section 108-9, however, contravenes its purpose as indicated by the Committee Comments: The need for a search arises " * * * when the officer first arrives at the place where the goods are to be seized." Ill. Ann. Stat., ch. 38, par. 108-9, Council Commentary, at 271 (Smith-Hurd, 1973).

The trial court's belief that *People* v. *Pugh* (1966), 69 Ill. App. 2d 312, 217 N.E.2d 557, was dispositive was erroneous since that case is distinguishable. In *Pugh,* defendant was admitted at the direction of the officers while the search of the premises was in progress. His detention and search occurred about fifteen minutes after the officers entered the apartment and before the officers had discovered any contraband in the apartment. The *Pugh* court further indicated that:

> " * * * We agree with the State that the execution of search warrants in narcotics cases is a risky business at best, and unless the police search all the persons present on the premises they endanger both themselves and the search they are making. Furthermore, the entry of the defendant onto premises where the police have reason to believe narcotics are concealed provides further grounds for his search. * * * "
>
> 69 Ill. App. 2d, at 316; 217 N.E.2d, at 559.

The circumstances in the instant case differ since the premises had been thoroughly searched, handguns and narcotics had already been recovered, and the residents had been arrested. The officers' reliance on section 108-9 was not well founded because its purpose had been attained by their successful execution of the warrant and the ensuing arrests. *Pugh* is also distinguishable because there is some indication that Raymond Pugh was the brother of Jessie Pugh, the resident named in the warrant. See *People* v. *Campbell* (1979), 67 Ill.

App. 3d 748, 750, 385 N.E.2d 171. Defendant's connection with the premises described in the warrant is not apparent.

The State contends that the requisite connection was established through Harris' testimony that he had known the defendant and Charles for one to one and one-half years. They had previously visited his apartment and on at least one occasion had been there at 3 to 4 a.m. Clearly, defendant and Charles had a greater connection with the premises than the defendant in *People* v. *Dukes* (1977), 48 Ill. App. 3d 237, 363 N.E.2d 62. Dukes was an innocent stranger who had mistakenly entered premises being searched. Defendant and Charles were guests and acquaintances of the Harrises. However, the *Dukes* court indicated that connection with the premises may mean more than a social guest:

> " * * * [T]he record articulates no facts indicating that the defendant had any connection with the premises described in the warrant. The defendant was not on the premises when the police officers arrived to execute the warrant, nor does it appear that the defendant lived on the premises or was related to anyone who lived there."
> 48 Ill. App. 3d, at 240, 363 N.E.2d, at 64.

See also W. LaFave, *Search and Seizure: Course of True Law,* 1966 U. of Ill. Law Forum 255, at pp. 271-273 (concerning the requirement of connection with the premises). Compare *People* v. *Campbell* (1979), 67 Ill. App. 3d 748, 385 N.E.2d 171 (defendant, who was a resident of the premises and entered without knocking while police were conducting a search, deemed to have sufficient connection with the premises).

Moreover, the record fails to indicate that the officers knew defendant had sufficient connection with the premises. Johnson testified that Charles was asked who he was, why he was there and whether he lived there. His response, if any, and any questioning of defendant are not of record. Gibson testified

that Charles told him he had come to see Carolyn Harris. Even if we accept the officer's testimony in a light most favorable to the State, defendant was merely a visitor arriving after a completed search. Accordingly, under these circumstances, we find that defendant lacked sufficient connection with the premises to justify her seizure and search.

We turn next to the twin purposes of section 108-9 to review whether the officers complied with the "reasonably detain to search" language of the statute. In other words, we review the record to see if the officers manifested specific articulable facts which, together with rational inferences from those facts, indicated the necessity to protect themselves from attack or to prevent disposal or concealment of contraband described in the warrant.

The State contends that the police reasonably believed that defendant might attack them. They had discovered three handguns in the apartment prior to the arrival of defendant and Charles and had found a weapon on Charles. However, at the point when defendant and Charles were "directed" to enter the apartment, Officer Gibson had his service revolver drawn and pointed. Johnson's testimony, reported above in pertinent part, clearly indicates that he was never in fear for his safety. He explained that he believed he could maintain physical control over defendant so long as he did not turn his back on her. Gibson testified he was apprehensive and cautious because handguns had previously been recovered. Yet, since he had his service revolver drawn, it is apparent that he, too, was in control. Both officers indicated they did not turn their backs on defendant and kept close proximity to her. Defendant made no furtive movements to indicate to the officers that they might be in danger.

Furthermore, in light of the trial court's opinion that Johnson and Gibson were not credible witnesses, we doubt the validity of their testimony that defendant may have had a gun

stored in the crotch of her pants. Johnson indicated that the bulge was pointed and might have been a weapon. Gibson testified the bulge was half-moon shaped and large. In short, we agree with defendant that the officers' testimony concerning the bulge in her crotch area is hardly consistent with the possibility of a concealed weapon. Accordingly, we find the record does not support a finding that the officers reasonably suspected an attack.

Finally, we also conclude that there is no showing that the police reasonably suspected defendant would destroy or conceal items described in the warrant. The State concedes that the record is silent as to whether either officer believed that defendant possessed any narcotics named in the warrant or might attempt to conceal or dispose of such items. Nonetheless, the State contends there is circumstantial justification for a reasonable belief that defendant was engaged in narcotics activities. Narcotics had been recovered from Carolyn Harris. Defendant and Charles knew the Harrises and had previously visited them. This visit occurred at about 3 a.m. and the police observed a bulge in defendant's pants.

We do not agree. Defendant was not even on the premises when the officers entered and began their search. When she did enter, the premises had been thoroughly searched, evidence gathered and the perpetrators handcuffed. The Committee Comments indicate that the need to search individuals not listed in the search warrant for items described in the warrant arises when the officers first arrive and execute the warrant. Accordingly, since the warrant had been successfully executed, there was no showing defendant would destroy or conceal items described in the warrant.

For the foregoing reasons, we find the detention to search defendant was unreasonable and we reverse the order of the circuit court of Cook County denying defendant's motion to

quash arrest and suppress physical evidence. Because defendant's arrest is quashed and because the sole evidence against defendant is evidence found as a result of the search, the judgment of conviction must be reversed. *People* v. *Bowen* (1963), 29 Ill. 2d 349, 194 N.E.2d 316, *cert. denied* (1964), 376 U.S. 927.

Reversed.

McGLOON and CAMPBELL, JJ., concur.

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5937

VENTURA E. YBARRA, *Appellant,*

v.

PEOPLE OF THE STATE OF ILLINOIS, *Appellee.*

On Appeal From the Appellate Court of Illinois, Second District

REPLY BRIEF FOR THE APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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REPLY BRIEF FOR THE APPELLANT

INTRODUCTION

Appellant takes issue with the manner in which the facts of this case are treated in appellee's brief. The appellee would have this Court believe that the complaint for search warrant established that patrons of the tavern were narcotics purchasers (Brief of appellee, p. 3) and that the sale of heroin at the tavern was "open and notorious". (Brief of appellee, pp. 6-7, 22). Both of these assertions are untrue. The complaint for search warrant (A. 3) does not even mention the patrons, and neither the complaint nor the testimony presented at the suppression hearing indicates that the patrons would have been aware that nar-

cotics were being sold in the bar. These facts will be discussed more fully in the body of this brief. (See pages 7-12, 15-16, *infra*).

ARGUMENT

I

Since the Initial Frisk of All of the Patrons of the Aurora Tap by a Police Officer Was Not Based Upon a Reasonable Belief That the Patrons Were Armed or Dangerous, the Initial Pat-Down and Subsequent Search of One of the Patrons, Ventura Ybarra, Was Illegal.

As the appellee itself concedes, it has advanced a new theory to justify the search of Ventura Ybarra. (Brief of appellee, p. 8) The trial and Appellate courts held the search justified under *Ill. Rev. Stat.*, 1975, Ch. 38, Sec. 108-9(b), which allows police officers executing a warrant to search all persons present to prevent the disposal or concealment of the items named in the warrant. The appellee now contends that the search of Ybarra was proper without regard to the statute, because it was performed with probable cause. This contention is made despite the fact that at the hearing on the motion to suppress in the Circuit Court of Kane County, Illinois, the prosecutor conceded that probable cause to search Ybarra did not exist. (A. 39)

Specifically, the appellee argues that the first pat-down search of Ybarra was a reasonable search for weapons, and that this pat-down yielded probable cause to believe that Ybarra possessed contraband. Both of these contentions are incorrect. The facts of this case demonstrate that the initial pat-down was impermissible, and, in any event,

the pat-down did not yield probable cause to justify a full search. Part A of this argument will deal with the question of the validity of the initial pat-down. Part B of the argument will deal with the validity of the second search.

A. The Rule Proposed by the Appellee—That a Pat-Down for Weapons of All Persons Found at a Public Establishment Where Police Officers Are Executing a Search Warrant Is *per se* Reasonable, So Long As the Officers "Do Not Have Reason to Believe That the Persons On the Scene Have No Relationship Whatever to the Premises or the Drugs Being Sought"—Would Result in the Search of Countless Citizens Whom the Police Had No Reason to Fear.

The appellee's first argument is that the initial frisk of Ventura Ybarra and all of the other patrons of the Aurora Tap was permissible as a reasonable weapons frisk. However, in order to reach this conclusion, the appellee finds it necessary to propose a *per se* rule, which it phrases in various ways. In the "Questions Presented" portion of its brief the appellee puts the question this way:

> Is it reasonable, under the Fourth Amendment and this Court's decisions in the *Terry v. Ohio* line of cases, for officers executing a search warrant seeking heroin allegedly being offered for sale in a small tavern[1] to frisk all patrons present at the time? (Brief of appellee, p. 1)

The appellee's answer to this question is yes. In the heading to Argument IA of its brief, the appellee asserts:

> It is *always* reasonable for officers to frisk all fully clothed adults on the premises, where the officers are

---

[1]The tavern was actually described as a *large* one-room tavern. (A. 59)

> executing a search warrant for heroin and the complaint has informed them that some or all of these persons are users and/or dealers in heroin.[2] (Brief of appellee, p. 9) (Emphasis added)

In the body of Argument IA, the appellee requests:

> . . . that this Court allow a limited pat-down search for weapons of all fully clothed persons old enough to carry them on the premises where a search warrant is being executed for heroin or similar hard, mind-altering narcotic drugs, where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought. (Brief of appellee, p. 17)

No matter how the appellee's request is phrased, its contention that the pat-down of the patrons was permissible cannot be based on *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Terry*, the Court held that where a police officer possesses a reasonable belief, based on specific and articulable facts, that a person is armed and dangerous, a frisk for weapons is permissible. *Terry*, 392 U.S. at 27. By contrast, the appellee asks this Court to fashion a rule that would permit police officers executing a search warrant to search *all* persons present for weapons even though the officers did not have any suspicions regarding those persons. Moreover, the statement of the appellee's proposed rule at page 17 of its brief includes the assertion that a search of all persons on premises where a search warrant is being executed should occur

[2]The complaint in fact did not so state. See pages 7-8 of this brief for a fuller discussion of the contents of the complaint for search warrant.

"where the officers do not have reason to believe that the persons on the scene have no relationship whatever to the premises or to the drugs being sought." This unique rule would apparently place the burden on the person about to be searched to show that he had no relationship to the premises or the contraband in order to avoid being searched, instead of placing the burden on the police to articulate the reasons for intrusion. Under this rule, if the police knew nothing about a person present where a warrant was being executed, they could search him.

The appellee's proposed rule would run directly contrary to the general rule that an intrusion on Fourth Amendment rights must be based on reasonable and articulable suspicion at the least. *Delaware v. Prouse*, _____ U.S. _____, 99 S. Ct. 1391, 59 L.Ed. 2d 662, 669 (1979); *Brown v. Texas*, _____ U.S. _____, _____ S. Ct. _____, 61 L.Ed. 2d 357 (1979). Appellee's position would also be contrary to the rule that a person's mere presence at the scene of suspected criminal activity cannot justify a search of that person. *Sibron v. New York*, 392 U.S. 40, 62, 88 S. Ct. 1889, 20 L. Ed. 2d 917, 934 (1968). (See original brief of appellant, p. 14). Finally, it would conflict with the proscription against "general warrants" contained in the Fourth Amendment. *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). (See original brief of appellant, p. 15). Moreover, such a rule would permit the search of countless citizens whom the police had no reason to fear. Any citizen enjoying a meal at a restaurant, shopping at a store, or sitting in a bar would be subject to search simply because someone on these premises was engaged in criminal activity.

Apparently, the appellee finds it necessary to adopt such an extreme position because the facts of this case demonstrate that the officer who frisked Ybarra and all of the other patrons had neither probable cause nor articulable suspicion regarding Ybarra or any other patron. An examination of the facts will demonstrate this.

First of all, contrary to the appellee's contention, the complaint for search warrant did not indicate explicitly or implicitly that the patrons of the Aurora Tap were narcotics purchasers or users. The pertinent portion of the complaint states as follows:

> 3. The informant related to me that over the weekend of 28 and 29 February he was in the tavern described and observed fifteen to twenty-five tin-foil packets on the person of the bartender "Greg" and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on "Greg" and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.
>
> 4. The informant advised me that over the weekend of 28 and 29 February he had a conversation with "Greg" and was advised that "Greg" would have heroin for sale on Monday March 1, 1976. This conversation took place in the tavern described. (A. 3)

Nowhere in this complaint are the patrons of the Aurora Tap even mentioned. The complaint does not allege that the informant ever saw a sale of narcotics to anyone, does not allege that a sale had ever taken place in the tavern, does not allege the name of anyone who might be purchasing narcotics, does not allege that the informant knew Ventura Ybarra or any other patron, does not allege that Greg, the alleged seller of narcotics, would be present in the bar on March 1, does not allege that any sale of narcotics would take place in the tavern, and does not allege at what time of day Greg would be selling heroin. Moreover, there was no showing in the complaint that anyone besides Greg who was connected with the tavern, nor any patron, ever sold or purchased narcotics in the bar or elsewhere, which is especially significant in light of the fact that there was no testimony that Greg was even present in the bar when the officers arrived. In short, the complaint for search warrant gave the police no reason to suspect any of the bar's patrons of any illegal activity.

In addition, the testimony of Officer Jerome Johnson, the officer who searched the patrons, indicates that he did not suspect, and had no reason to suspect, any patron of possessing a weapon or contraband. Johnson admitted that he had no indication that Venturra Ybarra or any other patron was violating any law (A. 28), and that he did not know any of the patrons and had not seen any of them before. (A. 26) Johnson also testified that Ybarra gave no indication of having a weapon (A. 27), made no gestures or other actions indicative of criminal conduct (A. 28), and did not act in any threatening manner. (A. 29) This testimony demonstrates that the pat-down of the patrons was not based on any reasonable or articulable suspicion, but was done simply as a matter of course.

Considering the facts outlined above, the authorities cited by the appellee do not support its assertion that the

pat-down in this case was permissible. The cases cited by the appellee have not adopted the *per se* rule suggested by the appellee; these authorities have generally required reasonable suspicion before a pat-down is permitted. Since the officers in this case had no suspicion at all, these cases actually support the appellant's position that the pat-down was improper. Likewise, while the interest in police safety is indeed a compelling one, that interest does not even come into play where, as here, the officers did not have any fears regarding the persons searched.[3]

What the appellee suggests in its brief is that, despite the absence of any reasonable belief that any of the patrons is armed or dangerous, a pat-down for weapons of all persons present is always permissible when police officers are executing a search warrant. This contention should be rejected, and the judgment of the Appellate Court should be reversed.

---

[3]In any event, it is completely irrelevant that of the 27 cases selected by the appellee for inclusion in its brief, six involved the recovery of weapons, or that of the 60 raw police files examined by the appellee's *amicus curiae* (the accuracy of which cannot be established), 52% involved recovery of weapons. (Brief of appellee, p. 15) The appellee does not contend that these cases constitute a statistically accurate sample of any larger group, and thus they stand only for the proposition that the appellee and its *amicus* were able to find several instances where weapons were recovered during the execution of search warrants. Moreover, the appellee has failed to demonstrate that this danger to officers requires that officers be allowed to search for weapons without and articulable suspicion, or that the power already given to police officers by this Court in *Terry v. Ohio, supra*, is insufficient to deal with the problem. Neither the appellee nor the *amicus* has shown that the searches in the cases they refer to were made without probable cause or reasonable suspicion.

B. Even If the Initial Pat-Down of Ybarra and the Other Patrons Had Been Proper, Which It Was Not, the Second Search of Ybarra Was Not Justified.

As discussed in Argument IA, *supra*, the initial pat-down of Ventura Ybarra and all the other patrons of the Aurora Tap was impermissible. However, even if one assumes that this initial procedure was proper, the second search of Ventura Ybarra, which resulted in the discovery of contraband, was not permissible.

During questioning by defense counsel at the suppression hearing in this case, Officer Jerome Johnson testified that when he first patted down Ventura Ybarra, he found nothing upon him. (A. 28) However, on cross-examination he testified that he felt a cigarette pack with objects in it. (A. 32) Officer Johnson did not immediately seize this item or direct any other officer to do so. Instead, he proceeded to search all of the other patrons of the tavern. (A. 32) At trial, Officer Johnson testified that prior to this second search he had no knowledge that Ybarra had anything on his person that was violative of any statute. (A. 59)

Based on the above set of facts, the appellee contends that when Officer Johnson undertook the second search of Ventura Ybarra, he had probable cause to believe that Ybarra possessed the contraband described in the warrant. The basic flaw in the State's reasoning is the assumption that when Officer Johnson felt "a cigarette pack with objects in it" in Ybarra's pants pocket, this gave him probable cause to believe that Ybarra had some of the contraband for which they were searching. Clearly, Officer Johnson did not believe that Ybarra possessed any contra-

band, for he testified that prior to the second search he did not have any knowledge that Ybarra had any contraband on his person. (A. 59) Johnson could have reached no other conclusion, for it is not logical to infer from the possession of a cigarette pack "with objects in it" that those objects are contraband. Officer Johnson had no idea what the objects in the cigarette pack were. The objects could have been cigarettes, a lighter, or a book of matches. Johnson's honest admission that he did not believe that Ybarra had contraband on his person before the second search indicates that nothing in his experience as a police officer led him to believe that the cigarette pack contained contraband, and this statement by the officer is, contrary to the State's contention, entitled to great weight. (Brief of appellee, p. 19) Indeed, the observations or inferences of the officer who conducts the search have always been given paramount importance in determining the permissibility of searches. See, *e.g., Terry v. Ohio, supra,* 392 U.S. at 4-7. In this case, where the police officer admitted he did not believe that Ybarra had contraband, where the prosecutor at trial conceded that there was no probable cause (A. 39), and where the facts support the conclusion that probable cause did not exist, the appellee's contention to the contrary is meritless.[4]

[4]The appellee contends at page 19 of its brief that ". . . Agent Johnson was not given the opportunity during direct or cross-examination at the suppression hearing to itemize and explain all the factors which gave him probable cause to conduct the second search and retrieve the heroin packets from Ybarra's pockets". On the contrary, Agent Johnson had ample opportunity to explain his action. The reason that "the factors which gave him probable cause" do not appear on the record is that it is obvious from Johnson's testimony that he did not have such probable cause. Indeed, at the suppression hearing, the prosecutor conceded that probable cause simply did not exist. (A. 39)

In short, even had the initial pat-down been permissible, Officer Johnson lacked probable cause to justify the second search. The judgment of the Illinois Appellate Court which approved the search should therefore be reversed.

II

The Facts of the Instant Case Show That the Search of Ventura Ybarra Was Not Based On Probable Cause or Reasonable Grounds to Believe That He Was Connected to the Premises or the Criminal Activity Under Investigation, or That He Might Dispose of the Warrant's Objects. Thus, Regardless of How Other Cases May Have Construed *Ill. Rev. Stat.*, Ch. 38, Sec. 108-9 and Statutes Similar to It, the Application of That Statute To Permit the Search In This Case Violated the Fourth Amendment.

Argument II of the appellee's brief advances the proposition that the initial pat-down of Ybarra and all the other patrons was permissible not as a weapons frisk, but as a search for narcotics.

The appellee's extensive discussion of the law in this argument is irrelevant, once the facts are viewed in their true light. The appellee's argument is that Illinois cases have construed the instant statute so as to require a reasonable belief that the person searched poses a threat to the officers conducting the search, is concealing contraband, or is connected to the premises searched. The appellee notes that similar statutes have been so construed in other states. Appellant fails to see the relevance of these other cases,

for here the Illinois Appellate Court did not, explicitly or implicitly, advance such a requirement in upholding the search of Ybarra. Instead, the Illinois Appellate Court used the statute to permit a search that was not based on probable cause, reasonable suspicion or any other objective standard. Regardless of how other courts have dealt with statutes such as this, the Appellate Court's interpretation of the statute brings it directly into conflict with the Fourth Amendment. The statute is thus unconstitutional as it was applied here.

The legal question to which the appellee addresses itself in Argument II of its brief is whether the search of a person present where a search warrant is being executed should be permitted only when the officers have probable cause to believe the person possesses the items being searched for, or whether some lesser degree of suspicion should suffice. Appellant contends that the probable cause standard should apply, but this question does not control the outcome of this case, for no matter how low a degree of suspicion is required, the search of Ybarra was impermissible. The appellee offers the following test:

> . . . this Court should employ the *Terry* balancing test to allow searches of persons on compact premises specified in the warrant[5], when there is information that drug trafficking is taking place at that location and the police have a reasonable belief that the persons present are connected with the criminal activity and are likely to be concealing the objects of the warrant in their clothing. (Brief of appellee, pp. 39-40)[6]

[5]The premises in this case were described as one *large* room. (A.59)

The fact relied upon by the State to support the proposition that the officers here had a reasonable belief that the persons present were connected with the criminal activity is that the patrons "were connected with the tavern by their choice to be present in a place where possession and sale of narcotics were rather open and notorious." (Brief of Appellee, p. 38) The assertion that narcotics dealing in the Aurora Tap was "open and notorious" is totally unsupported by the record. There is not the slightest evidence that the narcotics supposedly being dispensed there were in view of the patrons of this public place. The informant, in his complaint for search warrant, stated only that he observed tinfoil packets on the person of the bartender and behind the bar. He did not see them being sold to patrons, he did not see them out in the open, and he did not see them in the possession of anyone but Greg. The officers who arrived to execute the warrant saw no narcotics being

[6]At page 40 of its brief, appellee indicated that this would be only "a brief pat-down to discover forms in an individual's clothing which would give probable cause to believe he was carrying illicit drugs." Appellant fails to understand what use a pat-down would be in discovering contraband. While the form of a weapon is immediately apparent from the outside of clothing, the form of contraband is not. As this case demonstrates, almost any object felt through clothing *could* conceivably contain contraband, but almost any object could also have an innocent explanation. The feeling of an object which could contain contraband would not give the police probable cause to search further, and thus the pat-down will be useless to the police. Only a full search can result in the discovery of contraband, and probable cause should be required before such a search is permitted.

used or sold, and no narcotics were within the view of any of the patrons or the officers. In short, the idea that narcotics dealing was open and notorious at the Aurora Tap is wholly unsupported by the record in this case. And, as discussed previously at pages 7-12 of this brief and pages 10-13 of appellant's original brief, both the objective facts and the testimony of the searching officer make it clear that he had no suspicions of any kind regarding Ybarra or any other patron.

Since there are no facts which would give rise to reasonable suspicion that the patrons possessed narcotics, even this standard is not met. Appellant believes that if the officers sought to search any patron for narcotics, they could do so only if they had probable cause to believe that the patron was concealing narcotics. See *State v. Lewis*, 115 Ariz. 530, 566 P. 2d 678, 680 (1977). However, under any standard the intrusion in this case was not justified. The judgment of the Illinois Appellate Court should therefore be reversed.

CONCLUSION

For the reasons stated above, the search of Ventura Ybarra was a violation of the Fourth Amendment. The judgment of the Illinois Appellate Court should therefore be reversed.

Respectfully submitted,

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ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE STATE OF MONTANA, AS AMICI CURIAE IN SUPPORT OF THE APPELLEE.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Book.

Article.

Miscellaneous.

IN THE

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file has been granted by the Office of the State Appellate Defender, Ralph Ruebner, Esq., and Alan D. Goldberg, Esq., Counsel for the Appellant, and by Hon. William J. Scott, Attorney General, State of Illinois, Melbourne A. Noel, Jr., Esq., Counsel for the Appellee. Letters of consent of both parties have been filed with the Clerk of this Court. States are not required to obtain consent to file as *amici curiae*.

INTEREST OF THE AMICI CURIAE.

I. General Interest of the Amici Curiae.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

The Illinois Association of Chiefs of Police, Inc., is a not-for-profit Illinois association and consists of over 600 members who are Illinois police chiefs and senior law enforcement executives. It, too, seeks to represent in our courts the concern of the average citizen with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their effort to protect public safety.

The Attorney General of Montana is the chief law enforcement officer of his state with oversight for the fair and effective enforcement of the criminal law therein. Montana has a statute similar to the Illinois statute involved in this case.

II. Special Interest of the Amici Curiae.

Our particular interest in this case arises from the important constitutional and policy questions involved in the Illinois Statute (Illinois Revised Statutes, 1975, Chapter 38, Sec. 108-9) and the particular facts of this case. It is our belief that such a statute is absolutely essential to the protection of police officers from attack while executing duly issued search warrants, and in preventing the disposal or concealment of evidence described in such warrants and the discovery of other contraband, including weapons. It is our belief that when measured against the requirements of the Fourth Amendment, such a statute is reasonable on its face, and in its application, including to the facts of this case. The existence of such statutes encourages police officers to utilize the constitutionally preferred procedure of submitting their facts for a premises search to a magistrate for a search warrant, see *U. S.* v. *Ventresca,* 380 U. S. 102 (1965). We further believe that such statutes are highly desirable as reasonable and proper tools of law enforcement and that affirmance of the opinion of the court below will encourage the states to enact narrowly drawn and applied statutes that will serve the interests of law enforcement and protect the privacy and personal integrity of our law-abiding citizens.

ARGUMENT.

I.

Introduction.

Illinois Bureau of Investigation agents obtained a warrant for a search of a tavern in Kane County, Illinois known as the "Aurora Tap" for "evidence of the offense of possession of a controlled substance to be seized therefrom: heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." The Illinois Appellate

Court, Second District, in its opinion stated that ". . . in the complaint for the search warrant before us the allegation was made that the bar was frequented by persons illegally purchasing drugs," 373 N. E. 2d 1013, 1015, although the accuracy of this statement is disputed by the appellant in his brief. The premises were described by the Appellate Court as "dismal, drab and shabby," consisting of one room.

Only twelve patrons were present when the State agents, assisted by local police, arrived. In addition to a search of the premises, the patrons were searched. During the initial pat down of the appellant an officer felt a cigarette package with objects in it. A second search of his person turned up six tinfoil packs of heroin.

Probable cause for the search warrant is not an issue in this case. Appellant contends that the Illinois statute providing that a person executing a search warrant may search any person in the place at the time to prevent the disposal of articles or things described in the warrant is violative of the Fourth Amendment as applied to him. The statute is set forth as follows:

> *Illinois Revised Statutes,* 1975, Chapter 38, Sec. 108-9
>
> Detention and Search of Persons on Premises. In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:
>
> (a) To protect himself from attack,
>
> or
>
> (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

The trial court denied appellant's motion to suppress, finding that the search in question was permissible under Section (b) of the statute. The Illinois Appellate Court affirmed this finding and the conviction, ruling that the statute, as applied to a search for articles or things described in the warrant, did not offend the Fourth Amendment. The Court made it clear that

such a warrant would not authorize a "blanket search" of persons or patrons found in "large" retail or commercial establishments.

> But in the case before us the search was conducted in a one room bar where it is obvious from the complaint of the officers seeking the search warrant that heroin was being sold or dispensed. 373 N. E. 2d 1013, 1018.

The opinion of the Appellate Court states that four other jurisdictions have similar statutes—Arizona, Kansas, Georgia and the District of Columbia—and the Court turned to several of the reported decisions of these jurisdictions, as well as Illinois, for construction of the statute and resolution of the constitutional issue.

A recent work by a distinguished authority on the Fourth Amendment notes that the courts of these states have upheld searches similar to that in the instant case on the basis of such statutes. La Fave, Search and Seizure, Vol. 2, p. 144 (1978). A 1973 Law Review Comment stated that eleven states at that time empowered the police, when executing a search warrant, to search all persons found on the premises described therein. Three such states granted this power through a specified form of warrant (Del., Mass., N. H.) while eight simply authorized the search without setting forth an "approved" form of warrant (Conn., Ga., Ill., Kan., Mont., Nev., N. Y., Wis.). Comment, 58 Cornell L. Rev. 614 (1973).

Thus, several jurisdictions have at various times sought to clarify police powers in searching persons present at the time and place of execution of a search warrant. The comments of the Illinois Revision Committee probably best summed up the common legislative intent running through these statutes when it stated:

> The Committee felt that this section is necessary because it gives the officer a clear outline of his power in executing the warrant and removes doubt from a rather cloudy area of the law. Revision Committee Comments to Ill. Ann. Stat. ch. 38, Sec. 108-9 at 271 (Smith-Hurd, 1970).

This attempt to clarify police powers in this area of Fourth Amendment rights, and to link it to the special protections surrounding a search warrant—as opposed to warrantless searches where no determination of probable cause for the initial search has been made by a magistrate—is submitted by *amici* to be a laudatory legislative activity that should be encouraged by the Supreme Court by a decision upholding the search in the instant case.

II.

The Appellant Was Not Entitled to Suppression of the Heroin Seized from His Person, as the Police Officers Would Have Been Fully Justified in Searching Him Under the Facts of This Case Even Without the Statute.

The record from the preliminary hearing and trial indicates that when the police arrived at the Aurora Tap they announced their purpose and advised the 12 patrons that they were going to make a cursory search for weapons. No patrons were allowed to leave and no one was permitted to enter while the search took place. Appellant was patted down by Agent Johnson who stated that he felt a cigarette pack with objects in it. A second search of appellant two or three minutes later resulted in the removal of six tin foil packets of heroin from his pocket. Agent Johnson described his search of the appellant as "more or less a pat down, cursory search for weapons for our protection."

Under the rule of *Terry* v. *Ohio*, 392 U. S. 1 (1968), the police may take appropriate self-protective action when performing their duty in potentially dangerous situations. While *Terry* involved a stop and frisk in a typical street encounter setting, its rationale is equally applicable to situations where the police are executing a search warrant, and it is submitted that its sweep should be significantly broader in the latter cases.

Under *Terry* the self-protective search is limited to a pat-down of the suspect's outer clothing and a seizure of only hard objects whose size and shape give the officer probable cause

to believe that the suspect is armed. Obviously a police officer executing a search warrant has placed himself in a unique zone of danger. Persons at the scene may be potentially dangerous, since they may be powerfully motivated to conceal evidence of a crime, assault or kill the officer to prevent arrest, or seek to escape. The analogy to *Terry* is appropriate and the pat-down authority is clear.

However, what if the pat-down does not indicate the existence of an object that could be a weapon, but indicates that it might be the type of evidence specified in the warrant? Are the police then powerless to act? This seems manifestly absurd. It would seem that if the police have come by their information through purely proper means (the pat-down for their self-protection), then they should not be required to ignore the presence of the very evidence specified in their warrant, as to which they have a *duty* laid upon them by the command of a magistrate to search for and recover such evidence. Ignoring such evidence and failing to seize it forthwith would be a violation of that duty.

This was the case in *State* v. *Yarbrough*, 26 Or. App. 481 (1976), where the police were executing a search warrant for balloons of heroin. In their pat-down of the defendant who was at the scene, it was concluded by the police that an object felt on his person was not a weapon but was apparently one of the items listed in the search warrant. They seized it and the search was ruled proper.

In the instant case the warrant was for "heroin, contraband and other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture processing and distribution of controlled substances." Even members of the general public are by now familiar with the fact that such objects are frequently carried by criminals in cigarette packs, and certainly the police are aware of this. *U. S.* v. *Robinson*, 414 U. S. 218 (1973). When Agent Johnson conducted the pat-down of appellant, which he was entitled to do under *Terry*, and felt the cigarette pack, he had probable cause to believe

that appellant possessed evidence named in the warrant and was entitled to seize it.

It is submitted, however, that a more extensive patdown of suspects in search warrant execution cases should be allowed by this Court than would be permitted by *Terry* in the typical street encounter. The limited patdown of outer clothing permitted by *Terry* was tailored to the conditions of a one-on-one confrontation where the officer is focusing his attention upon one suspect. Under these conditions the suspect has relatively fewer opportunities to bring a weapon to bear against the officer. In a search warrant execution situation, however, the suspect will have more opportunities to reach into a pocket, purse, or bag while the police concentrate on moving about the premises to conduct the search. The primary focus of the police is the premises, not the persons on the premises. A search of premises is at best an arduous task calling for concentration free from distractions, and it allows the persons on the premises ready opportunities to do harm to the officers, unless such persons can be effectively neutralized.

It has been pointed out that it may be asked whether it is even necessary for the police to be able to point to specific and articulable facts tending to connect the person present at the scene of a search pursuant to a warrant with the criminal activity under investigation, or whether something less should suffice. LaFave, Search and Seizure, Vol. 2, p. 150 (1978). Perhaps it should be sufficient that the criminal activity that is the object of the search warrant is serious and that the person to be frisked is connected with the place where the criminal activity is taking place or evidence thereof is found pursuant to the warrant. As stated in *People* v. *Finn*, 73 Misc. 2d 266 (N. Y. 1973), it is "generally known by the police and others that those who traffic in large quantities of narcotics are often armed."

The mere presence of such persons should, as noted in *Finn*, be sufficient to give rise to sufficient and legal justification for the police to frisk all persons present for weapons, although *Finn*

involved the search of persons in an apartment, and *amici* do not argue for a rule broader than that which would be appropriate for the facts in the instant case, i.e., in relatively small premises, with a limited number of persons within the zone of danger to the police, and excluding large commercial or retail establishments.

Thus, it is submitted that a lesser showing that a person to be frisked "may be armed and presently dangerous" should suffice in these cases than would be required by *Terry* for a typical street confrontation. And when such a frisk reveals the presence of an object that the police reasonably believe may be an object specified in the search warrant, they should be permitted to complete their search and seize the object.

III.

A Statute Authorizing a Person Executing a Search Warrant to Search Any Person in the Place at the Time to Protect the Police from Attack or to Prevent the Disposal of Evidence Does Not Violate the Fourth Amendment on Its Face, or as Applied to the Facts of This Case.

As noted *supra*, Section (a) of the statute is no more than a codification of existing common law principles enunciated in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and related cases, permitting the police to take appropriate self-protective action when executing a search warrant.

On the other hand, the legislative intent of the Illinois draftsmen with respect to Section (b) is best set forth in the Illinois Revision Committee comments:

> In addition it is clear that the purpose of the warrant would be thwarted were not the officer given the second power found in subsection (b), i.e. to search the person for the things to be seized. The need for this power arises most often in the narcotics cases where disposition is most easily effected. Ill. Ann. Stat. ch. 38, Sec. 108-9, Revision Committee Comments at 271 (Smith-Hurd, 1970).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI,

Petitioner,

v.

DANIEL ACKERMAN,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR THE PETITIONER

STATEMENT

Petitioner includes this supplemental statement in his reply brief in order to bring a subsequent factual development to the Court's attention as well as to correct a number of misimpressions engendered by Respondent's recitation of the facts.

[1] In his "traversal brief" filed in the Pennsylvania Court of Common Pleas, Ferri acknowledged the possibility of a collateral attack on his conviction on the ground of "ineffective representation of counsel" and declared his intention "to exercise that remedy" (A.32). Such an attack

has now been commenced. On September 7, 1979, a motion under 28 U.S.C. §2255 was filed by Petitioner in the United States District Court for the Western District of Pennsylvania (Civ. No. 79-1255). Respondent's brief suggests (i) that the grant of a §2255 motion "would moot any damage claims" available to Petitioner (Resp. brief at 5 n. 9; 47 n. 46) and (ii) that the mere availability of such a post-conviction procedure justifies the foreclosure of all state-created civil malpractice actions against federal court-appointed attorneys (Resp. brief at 44-49). There is no merit to either argument. *See* Point I, *infra.*

[2] Petitioner is currently serving a thirty-year prison sentence, the result of a twenty-year sentence for offenses under the Criminal Code (Title 18, United States Code) and a consecutive ten-year sentence for offenses under the Internal Revenue Code (Title 26, United States Code). On page 4 of Respondent's brief the twenty-year sentence is described as "not subject to question". Similarly, at a later point, Respondent argues that "Petitioner will not even begin to serve his disputed sentence until his twenty-year *undisputed* sentence has been completed" (Resp. brief at 47 n. 46) [emphasis added]. While the instant action - *Ferri v. Ackerman* - concededly concerns only the ten-year sentence, the Respondent's language conveys a serious misimpression. In a contemporaneously-filed malpractice action against prior counsel, Ferri directed his attack toward those counts leading to the twenty-year sentence. *See* Pet. brief at 5 n. 3. That action was dismissed by the Pennsylvania courts solely on the authority of *Ferri v. Ackerman,* ___ Pa ___, 394 A.2d 553 (1978). *See Ferri v. Rossetti,* ___ Pa ___, 396 A.2d 1193 (1979). The Petition for a Writ of Certiorari in *Rossetti,* 78-6153, was filed in February 1979 and is apparently being held in abeyance by

this Court pending the resolution of the instant action. To describe Ferri's malpractice claim as involving solely the ten-year portion of his sentence is, therefore, a fragmentary portrayal of the facts.

[3] This Court granted certiorari to decide whether a private attorney, appointed as defense counsel under the Criminal Justice Act (18 U.S.C. §3006A), enjoys an absolute federal common-law immunity from a common-law malpractice action *for his failure to raise a statute of limitations defense* on his client's behalf (Pet. brief at 3).

Notwithstanding the posture of this case both below and as presented in the certiorari petition, Respondent seeks to undermine the merits of petitioner's claim by implying that no such defense existed. On page 4 of his brief, Respondent quotes a narrow exception to the general three-year statute of limitations applicable to prosecutions under the internal revenue laws. *See* 26 U.S.C. §6531 (A six-year period is provided for the offense of "willfully attempting. . . to evade or defeat any tax. . ."). As this Court made clear, however, in its interpretation of §6531's predecessor, the six-year period "is an excepting clause and therefore to be narrowly construed." *United States v. Scharton,* 285 U.S. 518, 521-522 (1931). *See also Waters v. United States,* 328 F.2d 739 (10th Cir. 1964). The "willfully . . . evade or defeat" language of §6531(2), relied on by Respondent, has uniformily been held applicable only where willful evasion of taxes constitutes an essential ingredient under the statute defining the offense. *United States v. Heinze,* 361 F.Supp 46, 54 (D.Del. 1973). *See also United States v. Scharton, supra,* 285 U.S. at 522. The statute under which Ferri was charged, 26 U.S.C. §5861, contains no such ingredient. *See United States v. Freed,* 401 U.S. 601, 607-610 (1971).

REPLY

THE AVAILABILITY OF A SECTION 2255 MOTION TO COLLATERALLY ATTACK A FEDERAL CONVICTION ON THE GROUND OF INEFFECTIVE ASSISTANCE OF COUNSEL DOES NOT JUSTIFY THE FORECLOSURE OF STATE-CREATED CIVIL DAMAGE ACTIONS FOR MALPRACTICE.

Respondent, conceding the often inadequate nature of representation provided by appointed attorneys (Resp. brief at 52), seeks to convince this Court that the conviction-oriented remedy provided by 28 U.S.C. §2255 is both adequate and desirable as the exclusive source of relief for the ineffectively represented indigent.[1] There are innumerable flaws in this position.[2]

A. The Existence of Alternatives to a State-Created Damage Action is Not an Appropriate Concern of Federal Law.

As Petitioner's opening brief demonstrates, the question of whether a private attorney, appointed to represent an indigent defendant under the Criminal Justice Act, may be sued for common-law malpractice is not governed by principles of federal common law (Pet. brief at 16-31). For

[1]Respondent points also to the availability of judicial and professional discipline (Resp. brief at 50-53). Such remedies, however, do nothing to compensate the wronged party.

[2]All the arguments which follow apply with equal force to the habeas corpus remedy available where the §2255 procedure is shown to be "inadequate or ineffective".

the same reasons, the adequacy and desirability of alternative remedies to such a common-law suit are questions for the state court alone. Petitioner seeks a remedy afforded by the state to all its citizens. To permit a fedeal court to alter or modify this state substantive law as a matter of federal common law would set *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), on its head.[3] The cases cited by Respondent for the proposition that alternative remedies may prompt the grant of immunity (Resp. brief at 45, 49) are not to the contrary. In each of these the dispute concerned the reach of 42 U.S.C. §1983. It is hardly surprising that when a federally-created remedy has been sought, a federal court may construe Congressional intent or construct federal common law in light of the wronged individual's ability to obtain alternative redress. But this Court is not being asked to define the scope of a federal remedy. Nor is any manifest federal interest involved. *See* Pet. brief at 25-31. No more is at issue than a private individual's right to sue another private individual, *see* Pet. brief at 17-24, under state law.

B. The Conviction-Oriented Remedy Available Under Section 2255 Does Not Provide "Adequate Relief" for the Wronged Individual.

Quite apart from its disservice to the interests of federalism, Respondent's argument rests upon the un-

[3]The limitations of *Erie* bind this Court in its appellate consideration of common-law actions commenced in state court just as surely as they bind federal courts in their adjudication of diversity claims. *Cf. Murdock v. Memphis*, 87 U.S. (20 Wall.) 690 (1875) (If the Court assumes jurisdiction of a case because of a federal question decided in the state court it may not proceed further and consider separate questions of state law).

supportable proposition that the §2255 remedy is adequate to vindicate "defendants' rights to effective assistance of counsel" (Resp. brief at 45).

The sole relief proided under §2255 is the vacating or setting aside of the sentence. Its impact is solely prospective. It offers no redress for past periods of incarceration, lost income, destruction of reputation and expenditures for legal assistance incurred in pursuing post-conviction relief.[4] This inadequacy is made all the more significant by the frequently long period of time which may elapse between the time of the trial and the discovery of appointed counsel's errors.[5] In the usual circumstances the indigent will be incarcerated during the intervening months or years.

Respondent implicitly recognizes this deficiency in the conviction-oriented remedy[6] but finds it inapplicable to the instant case "[s]ince Petitioner has not yet begun to serve [the] contested sentence" (Resp. brief at 56). As noted in the "statement" segment of this reply, however, this presentation of the facts is misleadingly fragmented and reflects only the fortuitous circumstance that *Ferri v. Ackerman* preceded *Ferri v. Rossetti* in the Pennsylvania Supreme Court. In any event, Respondent's argument goes to the question of damages rather than to the issue of liability. Surely, no purer example of a state law question could be

[4]Appointment of counsel for §2255 proceedings rests with the discretion of the court or magistrate. *See* 18 U.S.C. §3006A(g).

[5]The instant case provides an illustration of this possibility. It was not until eighteen months after his conviction that Petitioner first became aware of the waiver of the statute of limitations defense by his counsel's failure to raise it during the course of trial (A.31 n.1).

[6]Of course, under Respondent's position, this deficiency would impact only on those without the financial ability to pay for an attorney. The remedy of a civil suit would remain for those with retained counsel.

found. *See* Point I A, *supra*.

Respondent's proffering of post-conviction collateral attack as an alternative remedy is flawed, however, by more than the inadequacy of the relief §2255 affords. Respondent mistakenly assumes that there is "no practical difference" between the criteria employed on post-conviction review where ineffective assistance of counsel has been alleged and the civil malpractice standard (Resp. brief at 45-46). Legal malpractice has been defined by statute or judicial decision in widely varying language by each of the fifty states. *See* Mallen & Levit, *Legal Malpractice* §§111-120 (1977). Similarly, no consensus has emerged among the eleven federal courts of appeals on the degree of inadequate representation that constitutes "ineffective assistance of counsel" in violation of the Sixth Amendment. *See Maryland v. Marzullo*, 435 U.S. 1011 (1978) (Opinion of Rehnquist, J., dissenting from the denial of certiorari); *Wainwright v. Sykes*, 433 U.S. 72, 105 n. 6 (1977) (Brennan, J., dissenting). *See also* Project, *Eighth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1977-1978*, 67 Geo. L.J. 317, 515-521 (1978). When the states are understandably diverse as to what constitutes civilly actionable malpractice and the federal courts cannot agree what level of competence satisfies the constitutional imperative, it is difficult to understand what Respondent is comparing when he portrays the standards as substantially identical.

C. The Conviction-Oriented Remedy Available Under Section 2255 is Not Effective in Ensuring a Better Quality of Representation for Indigent Defendants.

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 395 (1971). In spite of this common-law history, Respondent exhorts this Court to adopt a position which would leave the reversal of a defendant's conviction as the exclusive remedy for inadequate representation by appointed counsel.

The traditional approach of this Court in Fourth Amendment cases has been to permit conviction-oriented remedies only when the alternatives prove inadequate to protect the integrity of the judicial process and the rights of wronged individuals. *See Mapp v. Ohio,* 367 U.S. 643, 652-653 (1961). *See also California v. Minjares,* ____ U.S. ____, 48 U.S.L.W. 3116 (August 28, 1979) (Rehnquist J., dissenting from denial of stay). Respondent urges precisely the reverse stance when dealing with the Sixth Amendment. The rationale is not readily apparent. Maintenance of the right to effective counsel is not inherently best served by conviction-oriented remedies. To be sure, the price must be paid for years of inferior defense work on the part of appointed counsel. Oftentimes the reversal of convictions is deemed necessary to invigorate the constitutional right to counsel. But there are other choices. Respondent's approach addresses the symptoms at the expense of the disease. Sentences vacated on Sixth Amendment grounds provide no prophylactic fallout. The civil damage action, on the other hand, provides a much needed deterrent to the taking of

appointments by those without the requisite experience and those without the available time. The presence of such a deterrent can, in turn, be expected to upgrade the quality of appointed counsel's performance and decrease the number of convictions that must be vacated as a consequence of ineffective legal assistance.

This Court recently took notice of the "all too familiar" story of appointed counsel's indifference to his client's legitimate request for help and articulated its "strong interest in ensuring that lawyers appointed to aid indigents discharge their responsibilities fairly". *Wilkins v. United States,* ____ U.S. ____, 99 S.Ct. 1829, 1830 (1979). This interest is far more effectively forwarded by the deterrent of civil accountability than by the *ad hoc* undoing of convictions resulting from inadequate representation.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's opening brief, the judgment of the Pennsylvania Supreme Court should be reversed and the case remanded.

Respectfully submitted,

/s/ JULIAN N. EULE

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Court-appointed Counsel for
Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI,
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DANIEL ACKERMAN,
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On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF COMMITTEE OF PENNSYLVANIA PUBLIC DEFENDERS AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI,
Petitioner,

v.

DANIEL ACKERMAN,
Respondent.

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BRIEF OF COMMITTEE OF PENNSYLVANIA PUBLIC DEFENDERS AS AMICUS CURIAE

INTEREST OF COMMITTEE OF PENNSYLVANIA PUBLIC DEFENDERS AS AMICUS CURIAE

The *ad hoc* Committee of Pennsylvania Public Defenders was formed for the purpose of filing this *amicus curiae* brief. The Committee is composed of 60 of the 65 heads of county Public Defender offices throughout Pennsylvania, and their names and identifications are listed in Appendix A to this brief. Dante G. Bertani is the past president of Public Defender Association of

Pennsylvania, having served in that capacity for three years. Blake E. Martin, Jr., is now the President of the Public Defender Association of Pennsylvania.

The public defender system in Pennsylvania was created by the Public Defender Act, Pa. Stat. Ann. tit. 16, § 9960.1, et seq. (Purdon). Under the provisions of that statute, the commissioners of each county appoint a public defender, and assistant public defenders as may be required. The public defender is responsible to provide legal counsel in criminal matters "to any person who, for lack of sufficient funds, is unable to obtain legal counsel." § 9960.6

The Committee of Pennsylvania Public Defenders has a vital interest in providing utmost freedom to its members to furnish a vigorous defense for those accused of crimes, so that defendants who are indigent receive a qualify of representation equal to any. The Committee believes that absolute immunity for all government-sponsored defense counsel is necessary for the continued vitality of the judicial phase of the criminal justice system. It is further necessary to attract and hold fine and sensitive lawyers in the low-paying positions as defenders and thus to discharge the public duty of providing the best possible defense to those not otherwise able to afford it.

The members of the Committee of Pennsylvania Public Defenders are government-sponsored defense counsel who daily perform advocacy functions in our criminal justice system. The members are in the unique position of dealing daily with those accused of crime and of knowing their attitudes and the attitudes of the other participants in the criminal courtroom. The Committee believes that this knowledge and understanding will provide some assistance to the Court in making a determination of the important issues so critical to the vitality of the public defender system.

Both parties have consented to permit the Committee of Pennsylvania Public Defenders to file this brief.

ARGUMENT

I. ABSOLUTE IMMUNITY SHOULD BE ACCORDED THE GOVERNMENT-SPONSORED CRIMINAL DEFENSE LAWYER

The criterion established by this Court for determining the applicability of the immunity doctrine, in each case, is to undertake "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976); *Butz* v. *Economou*, 438 U.S. 478, 508 (1978). In deciding whether a government-sponsored criminal defense lawyer is entitled to absolute immunity, inquiry must be made into relevant case law and consideration must be given to the public policy reasons supporting immunity.

A. Common Law Immunity Accorded the Government-Sponsored Criminal Defense Lawyer

The requirement of government-sponsored defense counsel for indigents accused of crime is of relatively recent origin. Nonetheless, the history of common law on the issue of absolute immunity for the government-sponsored criminal defense lawyer, though brief, has produced more than a few decisions. This considerable body of law is instructive, and leads to the important conclusion that absolute immunity has been accorded by every federal appellate court which has considered the issue. *Jones* v. *Warlick*, 364 F.2d 828 (4th Cir. 1966); *Sullens* v. *Carroll*, 446 F.2d 1392 (5th Cir. 1971); *Brown* v. *Joseph*, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); *Waits* v. *McGowan*, 516 F.2d 203 (3d Cir. 1975); *Minns* v. *Paul*, 542 F.2d 899 (4th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977); *Miller* v. *Barilla*, 549

F.2d 648 (9th Cir. 1977); *Robinson* v. *Bergstrom*, 579 F.2d 401 (7th Cir. 1978); *Walker* v. *Kruse*, 484 F.2d 802 (7th Cir. 1973).

No federal appellate court has denied immunity for the government-sponsored defense lawyer.

The cases make it clear that, so far as immunity is concerned, there is no distinction made among government-sponsored defense lawyers whether they be court-appointed, public defenders, or panel attorneys under the Criminal Justice Act, 18 U.S.C. § 3006A. Even the NLADA *amicus curiae* brief supports the position that no distinction should be made. NLADA Brief 3. The panel attorney under the Criminal Justice Act, 18 U.S.C. § 3006A, should be treated the same as the public defender; in fact, absolute immunity has been given to both.

B. The Justifications for Absolute Immunity for Judges and Prosecutors Apply With Equal Force to Immunize the Government-Sponsored Criminal Defense Lawyer

1. *The judge, the prosecutor and the defense lawyer are equally essential to the administration of criminal justice*

The ABA Standards, *The Defense Function* (Approved Draft, 1971), § 1.1(a) makes it clear that "[c]ounsel for the accused is an essential component of the administration of criminal justice," and that a properly constituted court is a "tripartite entity consisting of the judge . . . counsel for the prosecution, and counsel for the accused."

In providing representation for the indigent accused of crime, the government-sponsored defense lawyer performs a public function as critical and important as the function performed by the prosecutor and the judge. He must be free to provide a vigorous and fearless defense

of the accused. Frequently, the courtroom climate is hostile to his efforts, especially when he represents an unpopular person or one accused of a heinous crime. When he provides the criminal defense at the behest of his government and in compliance with constitutional mandate, he performs an important public duty indispensable to the effective operation of the criminal justice system.

In the criminal courtroom, the judge, the prosecutor and the government-sponsored counsel for the accused all strive to achieve substantial justice within our judicial system. The judge and the prosecutor both have absolute immunity from civil liability. The defense counsel should also have absolute immunity.

2. *Where the function performed is in the judicial phase of the criminal process, the immunity granted the participant is absolute*

The criminal process involves investigative activities and judicial activities. Persons involved in the former are entitled to qualified immunity (*see Imbler* v. *Pachtman*, *supra*, 424 U.S. at 430), while those involved in the judicial phase are accorded absolute immunity. The *Imbler* case held a state prosecutor absolutely immune in his role as an advocate because his "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.*

Butz v. *Economou*, *supra*, 438 U.S. 478, involved various federal participants in agency hearings. While some of the officials were granted only qualified immunity, all those involved in the judicial process were given absolute immunity. The federal hearing officer was absolutely immune because his role was "functionally comparable" to that of a judge, 438 U.S. at 513; the official who decided to initiate the administrative proceeding was

granted absolute immunity by analogy to prosecutorial immunity, 438 U.S. at 515-16; finally, and most significantly, the agency lawyer who presented the evidence was held absolutely immune, 538 U.S. at 516-17. This Court reasoned that the nature of the officials' responsibilities determined the immunity, and since the responsibilities were judicial in nature, immunity would be granted even in the administrative setting. The Court explained the necessity for absolute immunity:

> The cluster of immunities protecting the various participants in judge-supervised trials stems from the characteristics of the judicial process rather than its location. As the Bradley Court suggested, 13 Wall. (80 U.S.), at 348-349, 20 L.Ed. 646, controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus. See Pierson v. Ray, supra, at 554, 18 L. Ed.2d 288, 87 S. Ct. 1213. *Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.* [Emphasis supplied] 438 U.S. at 512

The prosecutor's absolute immunity in *Imbler* was based not only on the function of initiating prosecutions, but upon the prosecutor's conduct of the trial. 424 U.S. at 424

> Attaining the system's goal of accurately determining guilt or innocence requires that *both the prosecution and the defense* have wide discretion in the conduct of the trial and the presentation of evidence. [Emphasis supplied] 424 U.S. at 426.

Petitioner argues that the function of the defense lawyer is uniquely dissimilar to that of the judge or prosecutor, and he should therefore be denied immunity. Pet. brief at 36-38. The judge, the prosecutor, and counsel

for the accused all work within the judicial phase of the criminal justice system. Of course, all three have differing functions. The mere fact that the prosecutor does not perform the same duties as a judge does not deprive him of absolute immunity; nor should absolute immunity be denied defense counsel because he does not act as a prosecutor or judge.

The specific function performed is not the test; rather, it is that the participant's immunity in the judicial phase be supported by policy considerations. The prosecutor does not have immunity because he acts like a judge; he enjoys absolute immunity because the justification for it "is based upon the same considerations that underlie the common-law immunities of judges." *Imbler* v. *Pachtman, supra,* 424 U.S. at 422-423. For the prosecutor, absolute immunity is granted for policy reasons similar to those which underlie the judge's absolute immunity; namely, that "harassment by unfounded litigation" would cause him to deflect his energies from his duties, and "the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

The identical policy considerations employed in *Imbler* to provide absolute immunity for prosecutors apply with equal force to the government-sponsored defense lawyer. Harassment by unfounded litigation would deflect him from his important public duties, and his independent judgment during the course of a criminal trial might be shaded by the threat of his own liability.

Judicial and prosecutorial immunity are necessary to the healthy functioning of the criminal justice system. Society is benefited by judicial and prosecutorial immunity. The essential judicial functions served by the judge and prosecutor are fundamentally the same as those of the government-sponsored defense lawyer. All are "intimately associated with the judicial phase of the

criminal process." *Imbler* v. *Pachtman, supra,* 424 U.S. at 430. All should be treated alike in the determination of their civil liability.

Amicus curiae NLADA argues that the three participants in the criminal courtroom should be treated alike, but because it has concluded that the government-sponsored counsel for the accused should not have immunity, it is forced to advocate the position that the doctrine of absolute immunity for judges and prosecutors should be abrogated. NLADA brief at 14-16. The NLADA position is rationally indefensible. No judicial system could long exist if judges and prosecutors were liable to lawsuits for acts within the jurisdiction of their positions. Abrogation of absolute immunity for judges could cripple and ultimately destroy the effectiveness of the criminal justice system.

II. PUBLIC POLICY CONSIDERATIONS CALL FOR ABSOLUTE IMMUNITY FOR GOVERNMENT-SPONSORED CRIMINAL DEFENSE LAWYERS

The prosecutor is given absolute immunity "based upon the same considerations that underlie the common-law immunities of judges." *Imbler* v. *Pachtman, supra,* 424 U.S. at 422-423. A considered examination of the policy considerations supporting prosecutorial and judicial immunity leads to the conclusion that government-sponsored defense lawyers should be absolutely immune for similar policy reasons.

Absolute immunity for the criminal defense lawyer benefits the broad interests of the indigent client. Counsel for the accused is free to exercise his independent judgment without fear of the consequences of a civil suit from a dissatisfied client. Recruitment of lawyers to represent indigents is facilitated, thus providing for wider participation of the bar in the public duty of representing the poor.

Just as judicial immunity is "for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences," *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967), so absolute immunity for the criminal defense lawyer serves the broad interest of the client and the judicial system. "The reasoning which provides immunity for various public officials . . . is also applicable to the performance by private citizens of public services which play such a significant role in the administration of justice." *Walker* v. *Kruse, supra,* 484 F.2d at 802, 804.

A. The Position of the Government-Sponsored Criminal Defense Lawyer is Significantly Different from Privately Retained Counsel

The circumstances surrounding the representation of indigent clients accused of crime create a climate in which unfavorable results are more likely to occur than with paid representation. In the highly charged atmosphere of a criminal courtroom, where the state is exercising its power to deprive a citizen of liberty, emotions frequently erupt into unfounded charges of malice or lack of competence of the defense lawyer.

Where a client is able to pay for his private counsel, he is also able to select the lawyer he wants. He has a higher regard for his lawyer, who was probably chosen because of reputation or by referral from a trusted friend. The private lawyer is in a position to decide whether to represent the client, and is free to decline a client he considers troublesome. Even after represntation begins, he is generally freer to withdraw if difficulties arise.

On the other hand, as perceptively observed by *amicus curiae* NLADA, "indigent defendants have a fundamental distrust" of government-sponsored counsel. NLADA brief at 10. The indigent does not have the right to choose his

counsel, and the government-sponsored attorney generally cannot refuse representation. The indigent does not pay for legal services, and as in other aspects of life, anything easily obtained is lightly regarded. The government-sponsored lawyer must continue to represent troublesome or uncooperative clients, and is frequently called upon to take over the representation of such a client after private counsel has withdrawn. Giving a troublesome client who has a "fundamental distrust" of his lawyer the right to sue his lawyer will certainly not remedy his distrust, and will not accomplish anything to improve the lawyer-client relationship.

When an adverse decision is reached against the defendant and he faces conviction or imprisonment, he often seeks retaliation against the society which has denied him his freedom. He neither risks anything nor loses anything if he vents his anger in an action for damages against his own defense lawyer. After all, his counsel, if he is denied absolute immunity, will be the only participant in the judicial proceedings against whom action could be brought.

B. Suits Against Government-Sponsored Criminal Defense Lawyers Would Deflect the Lawyer's Energies

The caseload of the government-sponsored criminal defense lawyer is heavy. His duty to provide legal representation to the poor imposes great demands on his time and energy.

Any civil action against a government-sponsored criminal defense lawyer would deflect his energies from his main task of defending indigents accused of crime. If he is called upon to justify actions taken long ago, to prepare pleadings in his defense, to submit to discovery and even to trial, obviously he will have less time to provide services to his indigent clients.

"[A] deflection of the prosecutor's energies from his public duties" provides an important policy consideration to support absolute immunity for the prosecutor. *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 423. The same policy consideration justifies absolute immunity for the judge. It should likewise support absolute immunity for the government-sponsored defense lawyer.

C. Recruitment Would Be Hindered

"To deny immunity to the Public Defender and expose him to this potential liability would not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions." *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049. Government-sponsored defense lawyers are underpaid and overworked. The additional threat of civil liability at the suit of the client for whom he labors could be the very factor that would discourage the lawyer from performing the vital function of representing the poor.

By analogy, who would want to be a judge if he could be sued by a dissatisfied litigant? Without absolute immunity, who would choose to be a prosecutor? Is it not reasonable that a criminal defense lawyer would hesitate to represent an indigent if such representation might culminate in an action for civil damages?

D. The Chilling Effect

> "[I]f an attorney must work in constant fear of civil liability, it is the rights of the public that will suffer. Any such threat of liability visits an obvious chilling effect upon the attorney's enthusiasm to vigorously defend his client's position." *U.S. General, Inc.* v. *Schroeder*, 400 F. Supp. 713, 717 (E.D. Wisc. 1975).

The "chilling effect" created by the threat of civil liability manifests itself in several ways. The govern-

ment-sponsored defense lawyer, faced with the threat of potential liability, will lose his independence to control the technical aspects of defense strategy. Because he had so much at stake personally, he will tend to accede to the many demands of his client for the filing of motions or subpoenaing of witnesses whether or not such tactics would be best indicated by circumstances. See *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049; *John* v. *Hurt*, 489 F.2d 786, 788 (7th Cir. 1973).

Judge Learned Hand described the chilling effect as the "constant dread of retaliation" when he proffered it as a policy consideration to provide the prosecutor with absolute immunity. *Gregiore* v. *Biddle*, 177 F.2d 579, 581 (2nd Cir.), *cert. denied*, 339 U.S. 949 (1949). The threat of civil liability would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Id.*

An indigent accused of crime is constitutionally entitled to an effective defense. The lawyer must be free to exercise independent judgment in the management of the defense without, even subconsciously, shading his decisions with a view toward avoiding potential liability.

The "chilling effect" consideration supporting absolute immunity for a judge was expressed in *Butz* v. *Economou*, *supra*, 438 U.S. at 509:

> If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose "that independence without which no judiciary could either be respectable or useful." [*Bradley* v. *Fisher*, 13 Wall. (80 U.S.) 335, 347 (1872)].

A civil action against a defense lawyer would be costly to him in terms of time, money and damaged reputation. The natural tendency would be to do whatever is necessary to avoid such a threat. The lawyer would tend, for example, to document every strategy meeting

with the client in which trial tactics were discussed, lest the meeting be later denied by the client. The practical experience of Pennsylvania public defenders suggests that the tendency would be to spend more time representing and trying to satisfy the most troublesome clients to the detriment of other indigents in need of defense services. The courts themselves might shade their decisions on post-conviction relief, even subconsciously, if the civil liability of the defense lawyer were at stake, as recognized by this Court in granting absolute immunity to prosecutors. *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427, 428.

E. The Existence of Other Remedies Reduces the Need for Private Damage Actions

Other effective remedies are available to the criminal defendant complaining of his lawyer's representation. He may assert his claim "by direct appeal, by state post-conviction remedies, and by federal habeas corpus petitions." *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049. In *Butz*, this Court supported judicial immunity by considering "the correctibility of error on appeal," 438 U.S. at 512, and stated that "the safeguards built into the judicial process tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct." *Id.*

The availability of other effective remedies was reviewed as a policy consideration in the *Imbler* case to support absolute immunity for the prosecutor; this Court concluded:

> These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime. 424 U.S. at 529.

At the time of Ferri's criminal trial out of which this action arose, he was serving the last 8 years of a prison

term on a prior conviction. App. 8. In the indictment at issue, Ferri was sentenced for 20 years on bombing charges, Pet. brief at 7b, and he is not contesting that 20 year sentence. He is contesting, however, the additional 10 year sentence to commence after the expiration of the 20 year sentence. Ferri contends that a 3 year statute of limitations barred the prosecution on the revenue charges for which the 10 year sentence was imposed.

If Ferri is correct that the 3 year statute of limitations applies, then he has an adequate and complete remedy under the federal habeas corpus provisions of 28 U.S.C. § 2255. The failure of a lawyer to assert a statutory bar to prosecution, under any test, would entitle Ferri to have the additional 10 year sentence vacated.

A curious aspect of this case is that Ferri knows that he is entitled to apply for habeas corpus relief under § 2255 and has deliberately chosen not to do so. His brief explains that an unfavorable result might cause the dismissal of his civil action as collaterally estopped. Pet. brief at 42, n.23. He has elected not to apply for the relief which would be adequate and complete as it relates to the 10 year sentence not scheduled to begin until 20 years from the date of sentencing. He has chosen, rather, to seek money damages against his lawyer.

CONCLUSION

The government-sponsored criminal defense lawyer serves an indispensable public function in our criminal justice system. The same compelling public policy considerations which support absolute immunity for judges and prosecutors apply to justify absolute immunity for the government-sponsored defense lawyer. Together in the same criminal courtroom, they strive to achieve substantial justice for all.

The judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5981

FRANCIS RICK FERRI, *Petitioner*,

v.

DANIEL ACKERMAN, *Respondent*.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

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INDEX

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BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF NLADA AS AMICUS CURIAE

(1) The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

(2) NLADA, while recognizing that such position will expose its members to potential civil liability, joins petitioner in seeking reversal of the decision of the Pennsylvania Supreme Court holding the respondent, a court assigned private attorney, immune from a state malpractice action. NLADA has a keen interest in advancing the professionalism of public defenders and assigned private counsel, and the Association believes that this Court will be aided by the position of the only national group which speaks for public defenders.

(3) NLADA also has an interest in protecting the rights of our clients and in insuring that they are denied no rights on the basis of their wealth and submits this brief in support of our clients' equal access to the civil courts.

(4) The National Legal Aid and Defender Association has received the consent of both parties for the filing of this brief.

ARGUMENT

I. Federal Common Law Does Not Afford Immunity From Suit For Malpractice To Any Attorney Appointed To Represent An Indigent Defendant Under The Criminal Justice Act, Whether The Attorney Is Appointed From A Panel Or Bar Association Or Is A Member Of A Federal Public Defender Or Community Defender Organization.

In deciding the propriety of granting immunity from suit to particular government officials this Court has conducted "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Butz* v. *Economou,* 438 U.S. 478, 98 S.Ct. 2894, 2919 (1978). Accordingly, it has only extended the extraordinary protection of absolute immunity where such protection is both well established at common law and where the public interest clearly requires it. Neither our legal tradition nor the public interest in competent representation for indigent criminal defendants supports affording immunity to any attorney appointed under the Criminal Justice Act. Accordingly, this Court should conclude that all such counsel, whether selected from a panel or bar association or appointed by virtue of their position as members of a Federal Public Defender or Community Defender Organization, may be sued by these indigent clients for malpractice in the course of that representation.

A. Granting immunity from suit for malpractice to Federal Public Defenders, Community Defenders, or Panel Attorneys is contrary to our legal tradition and the content and history of the Criminal Justice Act.

There is no common law tradition of immunity for Criminal Justice Act attorneys which is even remotely comparable to that of prosecutors, judges, and grand jurors. Although such protection has been uniformly afforded those imbued with these public functions for centuries, the courts have divided over whether the relatively new role of *appointed* defense counsel, whether private attorney or public defender, warrants the same protection. Indeed, only one Court of Appeals has suggested that this sub-group of defense attorneys should be immunized, *Sullens* v. *Carroll,* 446 F.2d 1392 (5th Cir. 1971), while two others have implied the contrary, *Housand* v. *Heiman,* —— F.2d —— (2d Cir. March 29, 1979), slip op. 1827, 1832; *Robinson* v. *Bergstrom,* 579 F.2d 401, 411 (7th Cir. 1978), and one state supreme court has held that attorneys in its public

defender system are not so protected. *Spring* v. *Constantino*, 168 Conn. 563, 36 2A.2d 871 (1975).[1]

Moreover, there is no question but that Congress, in enacting the Criminal Justice Act and its amendments,

[1] Several Courts of Appeals have held that state public defenders are immune from actions under the Civil Rights Act. *Robinson* v. *Bergstrom, supra; Miller* v. *Barilla*, 549 F.2d 648 (9th Cir. 1977); *Minns* v. *Paul*, 542 F.2d 889 (4th Cir.), *cert. denied*, 429 U.S. 1102 (1977) [court-appointed private counsel]; *Brown* v. *Joseph*, 463 F.2d 1046 (3rd Cir.), *cert. denied*, 412 U.S. 950 (1973). To the extent that these decisions reflect a desire to equalize the treatment of appointed and retained counsel (as to whom there is no state action), *Brown* v. *Joseph*, *supra*, 463 F.2d at 1049, they are very much in keeping with the basic values of our criminal justice system and the policy of the Criminal Justice Act. However, they are not explicitly applicable here. To the extent they reflect distinctions between § 1983 suits and malpractice claims, they are likewise irrelevant to the case at bar. *Robinson* v. *Bergstrom*, *supra*, 579 F.2d at 411 [holding public defenders immune under § 1983 but suggesting that the plaintiff would still "have the same state action in tort for malpractice against the public defender as a former client might have against a retained attorney."]; see also *O'Brien* v. *Colbath*, 465 F.2d 358 (5th Cir. 1972) [stating that § 1983 was never intended as a vehicle for prosecuting malpractice suits against court-appointed attorneys and public defenders]; *Fletcher* v. *Hook*, 446 F.2d 14 (3rd Cir. 1971) [tort claim against court-appointed counsel for malpractice not cognizable under the Civil Rights Act].

Finally, where these opinions purport to apply the test of *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), and *Butz* v. *Economou*, *supra*, they do so incorrectly, see *infra*. Neither § 1983 nor any considerations of public policy support the position that a state public defender acts under color of state law when performing his or her function as a defense attorney. Indeed, to so hold would reinforce the view, already responsible for much of the indigent defendant's cynicism towards the criminal justice system, that appointed lawyers are merely another part of the same "state" system which is trying to convict and imprison him. Compare *Slavin* v. *Curry*, 574 F.2d 1256 (5th Cir. 1978); *Espinoza* v. *Rogers*, 470 F.2d 1174 (10th Cir. 1972); and see also *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971).

intended appointed attorneys performing their function to fall within the "tradition" of privately retained counsel, who are not immune from tort liability to their clients. In the first place, the 1970 amendment to the Act itself blurs the distinction between retained and appointed counsel by providing for court-ordered reimbursement where appropriate. 18 U.S.C. § 3006A. More importantly, the purpose of the Act was manifestly not to establish a functional distinction between attorneys representing defendants in the criminal justice system, but instead to achieve the goal of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938) that the system would be just as adversarial for the poor as it has always been for the rich. At the same time, in all the discussions and reports on the 1980 amendments there is not the slightest inkling that Congress wanted attorneys appointed under any facet of the mixed system it created to be protected from their own incompetence.

The desire to equate the function of C.J.A. counsel with the private attorney is perhaps most evidenced by the expressions of *concern* that defender organizations would not be independent of the influence of the judiciary and the prosecution. This potential problem was addressed by Professor Dallin H. Oaks, who authored the study report on the legislation at the request of the Justice Department and the Judicial Conference Committee. He acknowledged the possible danger with defender offices but said that the *disadvantage* would be overcome by the mixed system approach, which would on the whole improve the quality of representation for indigents. Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm. 91st Cong., 1st Sess., 289, 291-297, 301-303 (1969). Furthermore, the A.B.A. *Stand-*

ards Relating to Providing Defense Services, which were also considered in connection with the 1970 legislation, did not perceive any functional distinction between retained counsel, appointed counsel, or public defenders. To the contrary, the Standards emphasize the importance of guaranteeing the integrity of the attorney-client relationship regardless of which means of providing free defense counsel is selected and the concomitant necessity of assuring both the appearance and the reality of the appointed lawyer's independence from political and judicial interference. *Id.,* at 348, 351-352, 366-367.

B. The public interest in providing the effective assistance of counsel to all criminal defendants requires that public defenders and other counsel appointed under the Criminal Justice Act, like their privately retained counterparts, not be immune from suit for malpractice.

Where this Court has conferred absolute immunity it has done so based on a compelling public interest. Immunity has thus been granted judges, prosecutors and grand jurors because otherwise the exercise of their governmental functions would be severely impeded. The public interest behind the Criminal Justice Act, however, is not a governmental one but instead the need for effective representation for all criminal defendants as mandated by the Sixth Amendment. Since that interest is the same whether the defendant's attorney is retained or appointed it follows that just as immunizing hired counsel is seemingly unwarranted by the public interest, A.B.A. Code of Professional Responsibility, D.R. 6-102, so must be affording immunity to the appointed attorney. Moreover, that the arguments advanced for drawing a distinction between appointed and retained counsel on the question of

immunity in reality reflect at best acceptance of inferior (and therefore unconstitutional) representation for the indigent accused and at worst encouragement of such defective assistance of counsel.

The main contention advanced for immunizing public defenders and other appointed attorneys is that malpractice suits will interfere with counsels' "full exercise of professionalism, i.e., the unfettered discretion, in light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." *Minns* v. *Paul, supra,* 542 F.2d at 901. Manifest in this position are the views that the poor are more likely than the more wealthy to (1) pressure their attorneys into advancing frivolous claims and (2) sue their lawyers when they do not. There is no empirical data supporting either factual assertion, and the second is at least partially belied by the incidence of patently frivolous suits against *retained* counsel under the Civil Rights Act. See *Deas* v. *Potts,* 547 F.2d 800 (4th Cir. 1976); *Nelson* v. *Stratton,* 469 F.2d 1155 (5th Cir.) *cert. denied* 410 U.S. 957 (1973); *Steward* v. *Meeker,* 459 F.2d 669 (3rd Cir. 1972). Moreover, it is far more reasonable to attribute any frivolous claims by the poor to a lack of faith in defense counsel's stewardship, see *infra,* or to simple desperation (the most economically disadvantaged generally receive the harshest sentences) than to a callous disregard for judicial economy. Finally, this Court has repeatedly rejected the argument that the poor may be denied rights available to the rich on the elitist supposition that they have a greater tendency to abuse the judicial process. *Lindsey* v. *Normet,* 405 U.S. 56, 77

(1972); *Burns* v. *Ohio,* 360 U.S. 252, 257-258 (1959). It should respond in the same fashion here.

More implicit in the "professionalism" theory are some other disquieting assumptions which deserve comment. The first of these relates to the observation that all appointed counsel, and presumably public defenders in particular (since they represent indigent clients exclusively), would have inordinate difficulty resisting pressure to present meritless claims without immunity. This underestimates both the professional integrity of attorneys so employed and their devotion to advancing only those arguments which will legitimately advance the causes of their clients. While the public defender's task may at times be difficult, it will be performed to the same high standards with or without immunity.

The second suggestion is that court-appointed counsel are peculiarly required to assign priorities among their clients. Obviously, all attorneys must allocate their finite time and resources. This does not, however, justify that they be protected from tort actions for malpractice. The specific reference to this problem with respect to appointed attorneys thus implies that they are so burdened with work that they cannot adequately represent some clients without sacrificing the interests of others. This observation is certainly true in all too many instances. However, to advance it as support for denying compensatory relief to the victims of defective assistance of counsel is distressing to anyone concerned with the quality of representation for the indigent criminal defendant. Restricting the remedies for those injured by overworked and inadequately supported defender staffs is hardly an acceptable response to the problem. Indeed, the only acceptable response to this problem is for legislatures, and courts where necessary,

to insure that appointed counsel be given the resources necessary to provide effective assistance of counsel to the poor.

An even more insidious argument for immunity has been that leaving any appointed attorney open for suit will discourage competent attorneys from entering or remaining in this field. *Minns* v. *Paul, supra,* 542 F.2d at 901. This argument unfairly impugns the dedication and abilities of those lawyers who, in obedience to the commands of the Constitution and the standards of our profession, regularly defend the poor in criminal cases. Moreover, it shares with the first contention the vice of implicitly accepting unconstitutional inadequacies in our system for providing representation for the poor. At the same time, it even more clearly reveals the danger that such protection will encourage incompetence rather than more effective representation. To the extent there is a problem with attracting or retaining skilled attorneys to represent the poor, the rational solution is to provide higher salaries and better working conditions. After all, it could not seriously be contended that the absence of immunity discourages able attorneys from representing the rich. If there is a problem with tort liability, then the funding agency should secure malpractice insurance which is readily available to defender offices, and which, indeed, is already carried by many defenders through NLADA's group policy.

On the other hand, immunity is a most irrational means of stimulating the bar to defend the disadvantaged. To an attorney who is competent and devoted to such work and to his or her clients a grant of immunity from suit is of no moment. By definition he or she would not likely provide inadequate representation

and would not, in any event, desire to violate the Canons of Ethics by resisting a claim of malpractice by asserting immunity. Such protection would only attract to defender work that segment of the legal profession which would stand to benefit from it, the uncaring and the incompetent. Since this is the only effect of affording immunity to defenders of the poor, to do so would clearly violate the promise of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

While the analysis of the reasons advanced for immunity argues much more persuasively against than for it, that process does not exhaust the reasons why protection from tort claims is inconsistent with insuring the effective assistance of counsel. No attorney, civil or criminal, who makes his or her livelihood representing clients would minimize the value of securing the client's trust to successful performance. Without this critical bond it is impossible to lead even the most sophisticated client on the course which is most in his or her interest. The difficulties of establishing such trust are of course magnified when the client is unsophisticated and his or her freedom and reputation are at stake. Where the attorney is a public defender or, to a lesser extent, when the lawyer is court-appointed private counsel, the problem of gaining the client's trust is magnified due to the institutional position of government-funded counsel. As every public defender knows from experience and as every study of client relations has demonstrated, indigent defendants have a fundamental mistrust of such attorneys because they perceive them as having a primary allegiance to the state/prosecution. See Casper, *Improving Defender-Client Relations,* 34 NLADA Briefcase 114, 126 (1977); O'Brien, Peterson, Wright & Hostica, *The Criminal*

Lawyer: The Defendant's Perspective, 5 Am. J. Crim. L. 275, 292, 308 (1977); Booknote, 50 Denver L.J. 47, 83 (1973); Hearings on S. 1461 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Com on Constitutional Rights of the Senate Judiciary Comm. 91st Cong., 1st Sess., 305 (1969). The result of this perception and mistrust all too often is misguided self-help on the part of indigent clients and such disregarding of counsel's sound advice as to essentially lessen counsel's ability to provide effective representation. This crisis of confidence has adverse effects on the court system as well as on the client, since distrust of the "state defense lawyer" is also manifested in defendants' meritless appeals and collateral petitions.

The only way to eliminate this critical obstacle to providing skillful, constitutional representation to the economically disadvantaged is to move them as close as possible to the institutional position of private counsel, in whom indigent defendants have the greatest faith. It should be apparent that affording public defenders and court-appointed attorneys the same absolute immunity as prosecutors and judges, and thus distinguishing them even further from private counsel, would be a significant step in the wrong direction.

II. Affording Immunity To Any Attorney Appointed Under The Criminal Justice Act, While Privately Retained Counsel Remain Subject To Suit For Malpractice, Would Violate Equal Protection As An Invidious Distinction Based On Wealth.

A judicially created rule of law immunizing only counsel appointed under the Criminal Justice Act from suit for malpractice would clearly work a severe discrimination against the indigent criminal defendant without any compelling or even rational reason. Distinguishing between the poor and the rich in this regard

would contravene the constitutional mandate that the economically disadvantaged defendants in our country be placed on an equal footing at trial and on appeal with the more wealthy. Moreover, it is patently irrational, in light of the purpose of the Criminal Justice Act, to inflict the additional punishment of denying compensation where the C.J.A. representation falls short of minimum constitutional standards. Thus, to immunize such attorneys, where retained counsel remains amenable to suit, violates the Equal Protection provisions of the Fifth and Fourteenth Amendments to the Constitution.

This Court has repeatedly held unconstitutional procedures which deny indigents the same meaningful access to the courts to challenge their convictions as is enjoyed by their non-indigent peers. *Draper* v. *Washington,* 372 U.S. 487 (1963); *Lane* v. *Brown,* 372 U.S. 477 (1963); *Douglas* v. *California,* 372 U.S. 353 (1963); *Smith* v. *Bennett,* 365 U.S. 708 (1961); *Burns* v. *Ohio,* 360 U.S. 252 (1959); *Griffin* v. *Illinois,* 351 U.S. 12 (1956); cf. *Ross* v. *Moffitt,* 417 U.S. 600 (1974). Although these decisions concern access in criminal proceedings, they are not materially distinguishable from the situation at Bar. This Court has already held that government may not discriminate against the indigent accused because the proceeding at issue, though related to the criminal trial, is purely civil in nature. *James* v. *Strange,* 407 U.S. 128 (1972). Besides, were immunity from malpractice suits granted the indigents' counsel while the wealthy remain free to sue, only the impoverished defendants would suffer by irremediable exclusion from the only available grievance-resolving mechanism, the courts. The discrimination here would thus be far more invidious than that which results from requiring notes of testimony or a filing fee.

Moreover, even if this case involved a civil plaintiff who was not also a criminal defendant seeking redress for a constitutionally defective conviction, the discrimination based on wealth would be intolerable. Reasonable access to the courts, where they are the only effective means of dispute resolution, is a fundamental part of our legal heritage. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Total deprivation of a cause of action which is available to the wealthy is not reasonable access. It also does not present the kind of minimal financial burden, and thus minimal wealth discrimination, which this Court has upheld. See *Ortwein* v. *Schwab,* 410 U.S. 656 (1973); *United States* v. *Kras,* 409 U.S. 434 (1973).

Finally, evaluation of the conceivable justifications for specifically immunizing appointed counsel discloses no rational basis for this extreme step. As demonstrated in Argument I, *supra,* affording immunity to public defenders and appointed attorneys [2] would not improve the quality of legal representation for the poor. Moreover, even if it could be argued that such protection would in some cases have that salutary effect, it is not a rational means to the desired end. If the present system for providing free counsel is inadequate, the solution is to provide direct stimulus such as better training, necessary support services, and greater remuneration. It makes no sense to approach the problem in such indirect fashion, especially where the mechanism

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[2] Distinguishing between Federal Public Defenders, Community Defenders and other court-appointed counsel would certainly be irrational. The fact that a defendant is assigned to one rather than the other is fortuitous and there would be no justification for immunizing one type of attorney and not the others. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

adopted deprives those victimized by the deficiencies in the system of compensation for their injuries.

Neither can the discrimination proposed here be justified in terms of the need to prevent frivolous litigation in the criminal courts or in terms of insuring cost-sharing by the beneficiaries of the Criminal Justice Act. It is far too late in the jurisprudential day to argue that poor litigants should suffer discrimination in access to the courts because they are more frivolous litigious as a group than their wealthy peers. *Lindsey* v. *Norment, supra.* Finally, any possible assertion that immunity is an acceptable means of defraying the costs of appointing counsel is meritless. This allocation of the burden would be totally irrational since only those who received nothing, i.e., ineffective assistance, would pay.

Under these circumstances it can hardly be said that immunizing public defenders and court-appointed private lawyers would justify the cynicism and frustration with the criminal justice system which it would no doubt generate. See *Mayer* v. *City of Chicago,* 404 U.S. 189, 197-198 (1971).

III. Absolute Immunity Should Not Be Afforded To Either Judges, Prosecutors Or Defense Counsel, Whether Appointed Or Retained.

The respondent's argument that counsel provided to an indigent accused must be absolutely immune because of the close analogy between their function and that of prosecutors and judges actually proves that absolute immunity for such officials is not required by the public interest. If private and appointed counsel can equally be expected to exercise sound discretion despite potential tort liability, as they can, then certainly judges and

prosecutors performing similar discretionary functions would not be significantly impeded in their duties by the possibility of suit for intentional wrongs. Hence, this Court should reconsider its prior decisions and eliminate entirely this extreme doctrine as applied to the judiciary and the prosecution.

Where it has afforded total protection from suit this Court has uniformly accepted the view that without immunity the threat of civil suit would severely hamper the exercise of the decision-making process which is necessary to effective government. *Imbler* v. *Pachtman,* 424 U.S. 409 (1976); *Pierson* v. *Ray,* 386 U.S. 547 (1967). This belief has in turn played a major part in influencing the positions the Court has taken. The traditional nature of reliance on the alleged danger from potential liability in these instances notwithstanding, the considerations and experience relevant to the issue at bar demonstrate that it has been misplaced. Clearly the possibility of suit has the effect of improving the representation of both retained and appointed counsel in criminal cases. A similar salutary benefit would result from making judges and prosecutors amenable to suit for intentional wrongs. Namely, it would provide a check on particular abuses of power which cannot realistically be reached through the electoral or impeachment processes. At the same time, it is apparent from society's acceptance of malpractice actions against attorneys that effective exercise of similar types of discretion by prosecutors and judges would not be significantly deterred by a much more limited exposure to potential liability.

This Court's expressed fear that litigation against these public officials would dangerously deflect their energies from public duties is also unwarranted in

modern circumstances. There can be no credible suggestion that attorneys representing clients are prevented from satisfying their responsibilities by suits against them. The same conclusion must follow for judges and prosecutors. Moreover, the practical requirement of counsel to prosecute a claim against a public official eliminates the danger that officials would be burdened with frivolous suits. The availability of malpractice insurance and the legal representation which goes with it also means that the cost of such litigation in terms of the official's time and concern would be minimal.

Finally, there would be at least one other major benefit from providing compensation for the victims of intentional misconduct by government. By providing the electorate with a meaningful remedy for misuse of the public trust this Court would in the long run increase faith in the public's chosen or appointed leadership and thus promote the legitimacy of our democracy. For this reason as well prosecutors and judges should no longer enjoy absolute immunity.

CONCLUSION

For the reasons set forth herein, the National Legal Aid and Defender Association respectfully joins the Petitioner in urging this Court to reverse the mandate of the Pennsylvania Supreme Court and to remand this matter with directions to overrule the demurrer and to reinstate the complaint.

Respectfully submitted,

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